United States Circuit Court of [illegible]

FOR THE SECOND CIRCUIT.

THE NEW JERSEY LIGHTERAGE COM[illegible]

Libellant and Appe[illegible]

vs.

THE STEAMTUG "E. A. PACKER," HER [illegible] ETC., JOHN SCULLY,

Claimant and Appe[illegible]

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United [illegible] for the Southern District of New York.

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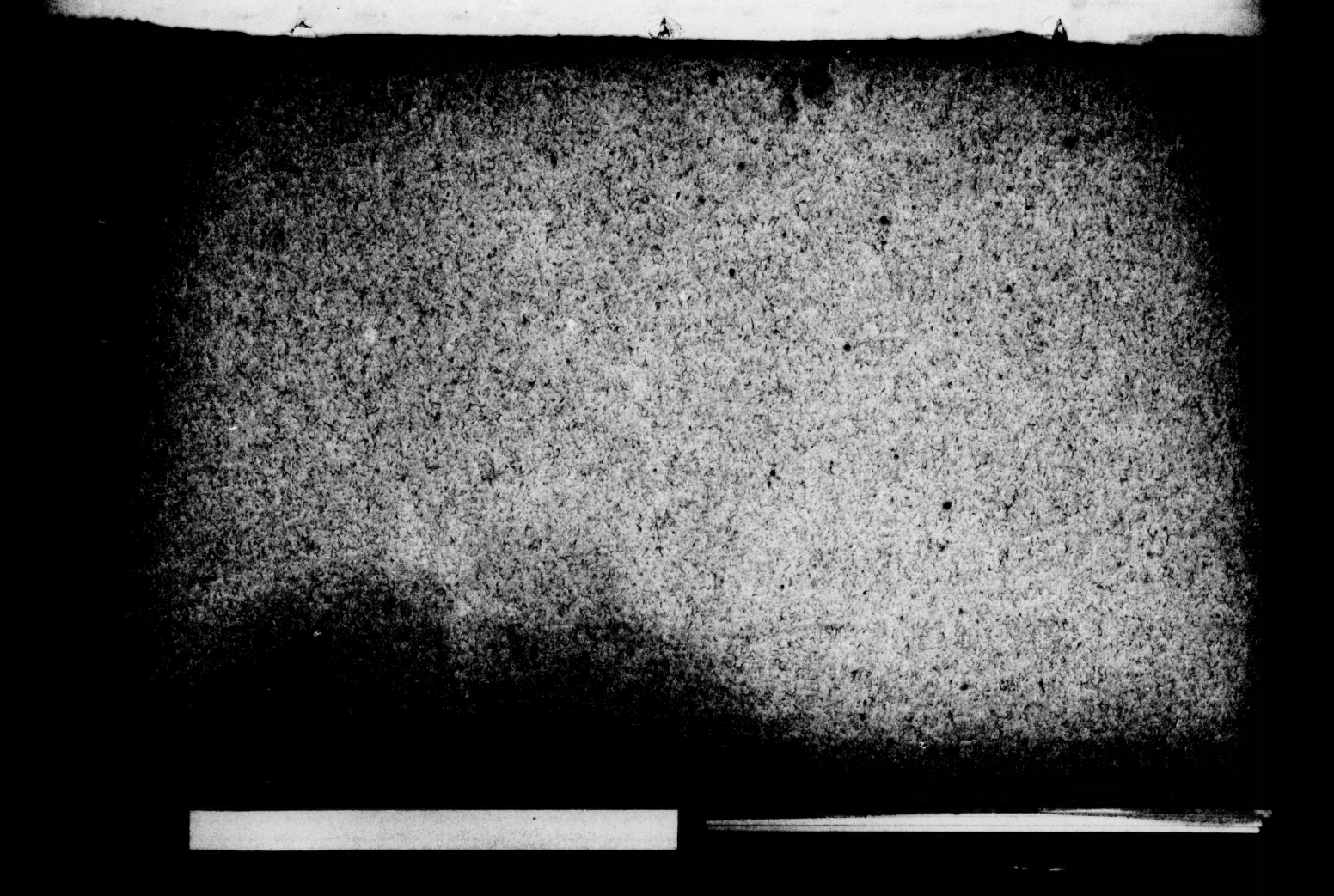

INDEX.

	PAGE
Libel	1
Monition	3
Claim of Owner of the *Packer*	5
Answer of the *Packer*	6
LIBELLANT'S WITNESSES.	
Frederick Parker	12
" " recalled	97
Finley Fraser	35
Charles F. Adams	66
Walter L. Schultz	72
William Ackerley	98
Jeremiah Connors	203
Patrick Devine	204
John McClean	206
Edward Sims	209
George Gavin	212
CLAIMANT'S WITNESSES.	
Steven Slover	102
" " resumed	129
" " recalled	169
James E. Purnell	108
James S. Purnell	123
Richard Firman	152
James Shields	165
John Scully	170
Eli A. Kellan	171
David Cox	178
Philip Hock	191
Michael McGoldrick	196
Isaac L. Fisher	197
Slover's Diagram	152
Petition of John Scully	215
Decree	220
Supplement to Apostles	221

DEPOSITIONS OF LIBELLANT ON APPEAL TO U. S. CIRCUIT COURT, S. D. OF N. Y.

	PAGE
Deposition of Benjamin P. Hansell	225
" " Thomas L. Morris	227
" " Walter L. Schultz	230
Note as to admission of Claimant's Ex. A.	231
" " " testimony marked in brackets	231
Extracts taken from record in Supreme Court of the U. S. (fols 59 to 86)	232
Mandate from Supreme Court of the U. S.	248
Decree on Mandate	251
Findings of Court (Wallace, *Cir. J.*)	253
Claimant's Exceptions	254
Final Decree	255
Stipulation as to Record	257
Notice of Appeal	258
Petition of Appeal	259
Assignment of Errors	262
Bond on Appeal	265
Citation	267
Clerk's Certificate	267

Opinion of District Ct (Brown J) 269-277
" " Circuit " (Wallace J) 236-238
" " U.S. Supreme " (Brown J) 278-289
2nd " " Circuit " (after Mandate) 290-298
" " " " of Appeals 299-310
Pleadings " " " for argument 311-315
Decree " " " 316
Clerks Certificate 317

To the Hon. William G. Choate, Judge of the District Court of the United States for the Southern District of New York: 1

The libel and complaint of The New Jersey Lighterage Company, owner of the barge *Atlanta*, of New York, and as common carrier of the cargo laden on board thereof, against the steamtug *Dr. John Wolverton*, her engine, &c., and the steamtug *E. A. Packer*, her engine, &c., and all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime alleges as follows:

2

First.—That the said The New Jersey Lighterage Company is, and at the times hereinafter mentioned was, a corporation duly incorporated under and by virtue of the laws of the State of New Jersey, and was the sole owner of the barge *Atlanta*, her tackle, &c.

Second.—That at or about four o'clock P. M., on the twenty-fifth day of October, 1880, the said barge *Atlanta*, laden with a valuable cargo of coffee and sugar, viz., 880 bags of coffee and 39 barrels of sugar, and being in every respect sound and seaworthy, and in all things fitted and provided for her intended voyage, left Roberts Stores, Brooklyn, in tow of the steamtug *Dr. John Wolverton*, bound for Long Dock, Jersey City. The said steamtug had said barge in tow by a hawser astern, said hawser being about twenty-five fathoms in length between the two 3

4 vessels. That when said tug and barge were about abreast of the South Ferry and not far from the ends of the piers on the New York shore, the said barge being directly behind said steamtug and following in the wake of said steamtug, and both vessels going at a rapid rate of speed, the said steamtug *E. A. Packer*, with loaded coal barge in tow alongside on her port side, was seen approaching at a rapid rate of speed on the port hand of said barge *Atlanta* and heading directly for the broadside of said last mentioned barge. That no whistles were blown by either steamtug, but that they both continued on their respective courses, so that the barge in tow of said steamtug *E. A. Packer* was run into
5 said barge *Atlanta*, striking her on the port side just forward of midships, breaking a large hole in her, and causing her to fill so rapidly that, to render the damage to cargo as small as possible, she was run ashore at the Battery just below Castle Garden.

THIRD.—That said collision was caused solely by the negligence of those in charge of each of said steamtugs, in that they did not give proper and timely signals to each other, and approached too close to each other to pass in safety, and approached each other at too great a rate of speed and did not pass each other in safety, as they could easily have done at the place in question, where the channel is
6 wide and there was no obstruction in the way—without any carelessness or negligence on the part of those in charge of said barge *Atlanta*, or of said coal barge.

FOURTH.—That by reason of said collision this libellant has suffered damage in the injury to said barge *Atlanta* in the sum of about fifteen hundred dollars, and that said cargo has sustained injury to the amount of about six thousand dollars, which this libellant, as common carrier thereof, claims to recover in this cause.

FIFTH.—That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Court, and said steamtugs are now within this district. 7

Wherefore libellant prays that process in due form of law may issue against said steamtug *Dr. John Wolverton*, her engine, &c., and *E. A. Packer*, her engine, &c., and that all persons having any interest therein may be cited to appear and answer all the matters aforesaid, and that this Court will decree that libellant recover its damages sustained as aforesaid with costs, and that said steamtugs be condemned and sold to pay the same, and that libellant may have such other and further relief as may be just. 8

J. B. GADDIS,
Prest. N. J. Lighterage Co.

Sworn to before me this 29th day of November, 1880.

WYLLYS BENEDICT,
L. S. Notary Public for Kings Co.
Certif. filed in N. Y. Co.

BENEDICT, TAFT & BENEDICT,
Libellant's Proctors.

R. D. BENEDICT,
Advocate.

Endorsed. Filed Oct. 29, 1880.

9

Southern District of New York, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE MARSHAL OF THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

Whereas, a libel hath been filed in the District Court of the United States for the Southern District of New York on the 29th day of October, in the year of our Lord one thousand eight hundred and eighty, by the New Jersey Lighterage Company against the steamtugs, *Dr. John Wolverton* and *E. A. Packer*,

10 their engines, &c., for collision, $7,500, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said steamtug *Dr. John Wolverton*, or vessel, her tackle, &c., may be cited in general and special to answer the premises, and all proceedings being had that the said steamtug *Dr. John Wolverton*, or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant.

You are therefore hereby commanded to attach the said steamtug *Dr. John Wolverton*, or vessel, her tackle, &c., and to detain the same in your cus-
11 tody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held in and for the Southern District of New York, on the 16th day of November, 1880, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And when you shall have done in the premises, do you then and there make return
12 thereof, together with this writ.

Witness, the Honorable WILLIAM G. CHOATE, Judge of the said Court, at the City of New York, in the Southern District of New York, this 29th day of October, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundredth and fifth.

L. S.

SAM'L H. LYMAN,
Clerk.

BENEDICT, TAFT & BENEDICT,
Proctors for Libellant.

At a Stated Term of the District Court of 13
the United States of America, for the Southern District of New York, held at the United States Court Rooms, in the City of New York, on Saturday, the 11th day of December, in the year of our Lord one thousand eight hundred and eighty.

Present—The Honorable WILLIAM G. CHOATE,
District Judge.

THE NEW JERSEY LIGHTERAGE COMPANY 14

vs.

The Steamtugs "DR. JOHN WOLVERTON," her Engines, &c., and the Steamtug "E. A. PACKER," her Engines, &c.

And now John Scully, owner of the steamtug *E. A. Packer*, intervening for his interest in the said 15
steamtug, appears before the Honorable Court, and makes claim to the said steamtug, &c., as the same are attached by the Marshal, under process of this Court, at the instance of the New Jersey Lighterage Company; and the said John Scully avers that he was in the possession of the said steamtug at the time of the attachment thereof, and that the person above named is true and *bona fide* owner of the said steamtug, and that no other person is the

16 owner thereof; wherefore he prays to defend accordingly.

JOHN SCULLY.

Sworn to and subscribed this 24th day of November, A. D. 1880, before me.

LEWIS R. STEGMAN,
Notary Public, Kings Co.
EDWARD D. MCCARTHY,
Proctor for Claimant.

Certificate filed in New York.
Endorsed. Filed December 11, 1880.

17

TO THE HONORABLE WILLIAM G. CHOATE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The answer of John Scully, merchant, of South Amboy, New Jersey, claimant and sole owner of the steamtug *E. A. Packer*, her engines, tackle, apparel and furniture, to the libel and complaint of the New Jersey Lighterage Company, in a cause of collision, civil and maritime, alleges:

FIRST.—He has no knowledge of the matters alleged in the first article of the libel aforesaid and
18 denies the same to be true.

SECOND.—He admits that a collision occurred whereby the barge *Atlanta* was somewhat injured, at the time and not far from the place set forth in the aforesaid libel.

THIRD.—He also admits and herein will specifically charge that the steamtug *Dr. John Wolverton* was negligent in respect of navigating her tow, the barge *Atlanta*, and that such negligence was the sole proximate cause of the collision.

FOURTH.—He alleges that the truth in respect of 19
said collision, the circumstances surrounding it and the immediate cause, to be as follows, that is to say: On the day in question the tug *E. A. Packer*, being well manned, properly equipped and in all respects seaworthy, had brought a tow of loaded boats from Port Johnson to New York. She had taken her tow up the North River, discharging boats at different places. Her last landing in the North River was Pier 9. From Pier 9 she proceeded to go down the North River, round the Battery, and then up the East River as far as Sixty-first street, where she was to discharge the last boat in her tow.

When she left pier 9 she had but one boat in tow, it wit, Cross Creek barge No. 5, which was heavily 20
loaded with coal. This barge was securely lashed to her port side.

It became necessary for her in rounding the Battery to keep quite close to the New York shore, because at that time, which was between four o'clock and one half past four o'clock P. M., the tide was running out of the East River and sweeping around the Battery with a strong current, so that it would have been very difficult for the *Packer* to have held up with her tow if far out in the stream. The *Packer* was going at the rate of not more than three or four miles through the water. As she was rounding the Battery she was not more than two hundred yards, or about that distance, from the 21
New York shore. She was making very little headway past the land, it being found very difficult to make head with her tow against the tide. As she was rounding the Battery and when opposite or about opposite Pier 1, East River, she saw some distance ahead, at least five hundred yards ahead, the steamtug *Dr. John Wolverton*, having in tow on a hawser a barge which your claimant believes to have been the barge *Atlanta*. The *Wolverton* and her tow were coming down and partly across the East River and were feeling the full sweep of the tide. The *Wolverton* was much

22 nearer the middle of the stream than was the *Packer*, being several hundred feet further away from the New York shore. The barge *Atlanta* in tow of the *Wolverton*, as aforesaid, did not follow her tug in a direct line or on the very same course, but was swept by the tide considerably further out into the stream than was the tug.

The hawser line from the *Wolverton* to her tow was about one hundred and eighty feet long.

It was apparent at once to the persons in charge of the *Packer*, that she, the *Packer*, could not port her wheel and go to the right of the *Wolverton* and her tow. The *Wolverton* was coming on at the rate of at least seven miles per hour past the land,
23 and she was so far out in the river, that even had the *Packer* been unencumbered with a tow it would have been impossible to clear the barge *Atlanta* by going off on a port wheel. But as the tide was then running, loaded down as the *Packer* was with a heavy tow, any movement to the right would have rendered a collision with the *Wolverton* inevitable. At this time there were two men in the pilot house of the *Packer* and a lookout forward on deck.

One of the men in the pilot house was a regular licensed pilot. Accordingly when the tugs were at least 500 yards apart, and when the tug *Wolverton* had really nothing to do but keep her course in order to avoid a collision, the tug *Packer* blew loudly
24 and distinctly two whistles. This signified that she, the *Packer*, would keep her wheel starboard and go to the left, that is between the *Wolverton* and the New York shore, which was the only course possible for her to take. The *Wolverton* made no reply whatever to these whistles, neither did she change her course or slacken her speed. Whereupon the *Packer*, after the lapse of but a few seconds, again blew two whistles, this time sharply and quickly. The *Wolverton* paid no attention to these, neither did she slacken her speed, but she did change her course somewhat, in that she seemed to be making in more for the New York shore, as if with the in-

tention of running under the *Packer's* bow and passing between her and the New York shore. 25

It then became evident that a collision was imminent with the *Wolverton* or with her tow, because although the *Wolverton* might pass under the *Packer's* bows, the tow *Atlanta*, swinging as she did with the tide, could hardly do so.

Accordingly the headway of the *Packer* was stopped; her engines were reversed and she began slowly to go back. The *Wolverton* coming on passed under her bows quite narrowly and passed down on the port side of the Cross Creek barge without touching her, but the barge *Atlanta* was not able to do so. While crossing the bows of the *Packer* and her tow, her port side came in contact with the stem of the barge, and received some injuries above her water line. 26

The foregoing are the facts of the collision in the libel set forth and the statement of facts in the libel contained, except in so far forth as they agree with this answer are untrue.

FIFTH.—Your claimant charges that the whole fault of the said collision is attributable to the tug *Dr. John Wolverton*, and to her tow, the barge *Atlanta*, on the following respects:

1. The tug *Wolverton* did not have a good and sufficient lookout. 27

2d. The tug *Wolverton* was in fault in towing her barge on a hawser when the tide was so strong and around a point of so much danger as the Battery.

3d. The tug *Wolverton* was in fault in not heeding the signal whistles of the *Packer*.

4th. It was gross carelessness in the tug *Wolverton* to attempt to pass the *Packer* on her port side, it being evident that if she did

28 so her tow would swing against the *Packer* or her barge, and there being moreover every facility for the *Wolverton* to keep to the right, that is to say further in the stream.

5th. The tug *Wolverton* was going at too high a rate of speed.

6th. The barge *Atlanta* was in fault for not having kept clear of the creek barge as she might have done had she been properly steered. She was also in fault in not casting off her hawser before the collision occurred.

29 SIXTH.—Your claimant further alleges that the tug *Packer* was in nowise to blame for the said collision. She took every means to avoid it that was possible, and she took them in time. She was moving very slowly and carefully, and had been doing so ever since she first felt the ebb tide.

SEVENTH.—Your claimant, further answering, alleges that the damages in this case were grossly and needlessly heightened by the careless conduct of the persons in charge of the lighter or barge *Atlanta* and of her cargo. She was not full loaded, and her cargo might very easily have been shifted
30 from the port side to the starboard side and escaped contact with the salt water. She (the lighter) was beached in an improper place.

After she was beached no care was taken to save her cargo for several hours. The injury she received was on her port side and above the waterline, and nothing but carelessness in those who controlled her led to the destruction of so much of her cargo as it is alleged was destroyed.

Wherefore your claimant prays that this Honorable Court would be pleased to pronounce against the said libel and to condemn the libellant in costs,

and otherwise law and justice administer in the premises. 31

JOHN SCULLY.

Sworn to before me this 11th day of November, 1880.

JAMES H. ELLIOT,
SEAL. Notary Public,
New York County.

EDWARD D. McCARTHY,
Claimant's Proctor.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

32

THE NEW JERSEY LIGHTERAGE COMPANY

vs.

The Steamtugs "DR. JOHN WOLVERTON" and "E. A. PACKER."

Before Brown, *J.*

NEW YORK, May 15, 1883.

APPEARANCES: 33

Messrs. BENEDICT, TAFT & BENEDICT, for the Libellants.

ROBERT D. BENEDICT, Esq., of Counsel.

E. D. McCARTHY, Esq., for the Claimants.

It is stipulated between the parties to this cause that the testimony shall be taken by the stenographer; that the fee therefor shall be a taxable disbursement, each side to pay one half.

Mr. Benedict states the contents of the libel.

Mr. McCarthy reads the answer of the owner of the steamtug *E. A. Packer.*

34 FREDERICK PARKER, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Benedict:

Q. Where do you live? A. In 59 Henry street, New York.

Q. What is your business? A. Lighterman.

Q. How long have you been a lighterman? A. Since 1859.

Q. Do you know the barge *Atlanta?* A. Yes, sir.

Q. Were you attached to her in October, 1880? A. Yes, sir; I was master of her.

Q. At the time she had the collison? A. Yes, sir.

35 Q. What were you in tow of at this time? A. The *Wolverton.*

Q. What time of day was the collision? A. About half-past four, as near as I could judge; we left Brooklyn about four o'clock, and it was about half-past four.

Q. Whereabouts did the collision take place. A. I should judge off what we call the Custom Gap, between South Ferry and where the Barge Office is.

Q. Where had you started from? A. From Roberts' Stores, Brooklyn.

Q. In tow of what? A. Of the *Wolverton.*

Q. Where were you bound for? A. Long Dock, Jersey City.

36 Q. Were you being towed by the *Wolverton* on a hawser or alongside? A. Towed on a hawser.

Q. How long a hawser? A. About fifteen fathoms.

Q. Do you mean by that fifteen fathoms altogether? A. The line was only twenty-five fathoms altogether; it was a new line, three and a-half inch.

Q. And there were fifteen fathoms between you and the *Wolverton?* A. I should judge so.

Q. Who was on board the barge? A. The deck hand and myself.

Q. Where were you standing? A. On the star-

board side of the wheel, and my mate was on the port side of the wheel. 37

Q. You both had hold of the wheel, and were managing it? A. Yes, sir.

Q. Was the *Atlanta* empty or loaded? A. She was loaded with coffee and sugar.

Q. How was the tide at that time? A. It was about half ebb.

By the Court:

Q. Were you sunk? A. Yes, sir.

Q. Immediately? A. Yes, sir.

Q. How far off from the piers? A. About two or three hundred feet, I should judge; the bow of the canal-boat fetched the whole side of the barge right 38 in—the whole bow.

Q. You didn't sink on the spot? A. No, sir; she came right up and was run ashore.

By Mr. Benedict:

Q. State what happened as you approached South Ferry? A. Everything went well; we see the *Packer* coming up, and see the *Wolverton* change.

Q. Whereabouts was your tow when you first saw the *Packer*? A. I think she was two or three hundred feet from me when I first detected her.

Q. From you or from the *Wolverton?* A. We were, I should judge.

By the Court: 39

Q. You first noticed the *Packer* when you were two or three hundred feet from the *Packer?* A. Yes, sir.

By Mr. Benedict:

Q. Whereabouts did she bear from you? A. Two or three points off the port bow.

Q. Whereabouts was she heading? A. I should judge for the East River, as far as I could place her.

Q. Heading towards you? A. Yes, sir; she was trying to get inside the *Wolverton*, between the New York shore and the *Wolverton*.

By the Court:

Q. Do you know which way you were heading at the time? A. We were heading up the North River.

Q. How were you heading at that time when she bore two or three points off your port bow? A. We were heading up the North River, just after going around the Battery.

By Mr. Benedict:

Q. When you say you were heading up the North River, do you mean you had got by the Battery? A. We had got by the Barge Office, that is, between South Ferry and the Barge Office.

41 Q. Do you mean that you were heading that way, or going around toward the North River, but not actually heading up the North River? A. Sort of diagonally—straight across like.

Q. You were heading along by the Battery? A. Yes, sir.

Q. About how far out from the shore? A. I guess she was midstream.

Q. Were you any further out from the shore than the *Wolverton*? A. No; I was right straight after the *Wolverton*.

Q. What was the necessity of your being at the wheel of your barge at this time? A. I always steer the barge; always.

42 Q. Was it necessary to have any one steer her at this time? A. No, but they generally be there; the other man is always there.

Q. Why was it necessary for any one to be at the wheel if the *Wolverton* was towing right ahead of you? A. We were towing on a hawser, and had to steer after the *Wolverton*—had to steer after her wake.

Q. You were keeping—— A. The straight course after the *Wolverton*.

Q. How soon did you think there was going to be a collision before it occurred? A. I think two or three minutes, I should judge.

Q. How soon after you first saw the *Packer* approaching—that is to say, as soon as you first saw the *Packer* you didn't think there was going to be a collision then, did you? A. No. 43

Q. What made you first think there was going to be a collision? A. My mate drawing my attention about the *Packer* coming into me; my mate was on the port side of the wheel and I was on the starboard side.

Q. Was the *Packer* alone, or did she have a tow? A. She had a canal-boat in tow.

Q. Alongside or on a hawser? A. Alongside.

Q. And was the *Packer* aft on the canal-boat she was towing? A. Yes, sir; she was aft; they generally get aft; the canal-boat was about thirty or forty feet ahead of the tow boat which was bringing the tow alongside. 44

Q. Did you hear any whistle from the *Packer*? A. No, sir.

Q. What was done on your boat when you saw there was going to be a collision? A. I put my helm hard aport and lashed it aport, and run out and hailed the *Packer* and asked him to go back; me and my mate hailed him.

Q. Did you notice whether he was going back or not? A. No; the water was breaking on to the canal-boat's bow.

Q. Did you notice any change on the part of the *Wolverton*? A. Yes; he ported his helm and went in shore, and I followed him. 45

Q. It was then too late to avoid a collision; which struck you, the *Packer* or the boat that was in tow? A. The coal boat.

Q. Whereabouts? A. Pretty near amidships.

Q. Amidships of you? A. Amidships of the barge.

Q. What part of her struck you? A. The canal-boat's bow.

Q. Square? A. Right square; went right through; stove the whole side in from the futtocks up to the covering board.

Q. What did you do then? A. The *Wolverton*

46 got alongside of me and run me ashore; the *Packer* backed out.

Q. Did you get a hawser? A. The *Wolverton* got a hawser to me and run me ashore.

Q. Why did she give you a hawser? A. The hawser parted when we struck.

Q. In consequence of the blow? A. Yes, sir.

Q. And she then came back and got another hawser to you? A. Yes, sir; and run me ashore this side of the Battery—this side of Castle Garden.

Q. How full of water were you then? A. She was more than half full then.

47 CROSS-EXAMINED by Mr. McCarthy:

Q. Were you part owner in the barge *Atlanta?* A. No, sir; only paid by weekly salary.

Q. How long have you been on the *Atlanta?* A. Over three years.

Q. In the service of the New Jersey Lighterage Company? A. Since 1865 I have been in their service.

Q. How was the *Atlanta* built? A. Built a regular barge, by Burtis of Red Hook.

Q. How was the sides constructed? A. Three-inch oak and timbers—I never measured the timbers; and her covering boards four and a half inches.

48 Q. What was her carrying capacity? A. Four hundred tons.

Q. Was she decked? A. Yes, sir.

Q. Did she have guards on her sides? A. Yes, sir.

Q. How wide? A. I never measured them.

Q. Can't you give me an idea? A. I couldn't; I suppose two or three feet--three feet any way.

Q. Have you ever been in charge of steamtugs? A. No, sir.

Q. You don't know anything about navigating and managing a steamtug? A. No, sir.

Q. Did you live on the *Atlanta?* A. No, sir.

Q. Did you ever have the *Atlanta* towed alongside 49
of tugs? A. When she is loaded very deep she is towed so, but very seldom.

Q. I didn't ask you whether very seldom or often. I asked you if she ever was? A. When she is loaded deep she is towed alongside.

Q. Then you have had her? A. Yes, sir; when she is loaded deep.

Q. When her guards are completely under water? A. No, sir; you can't load her till the guards are under water; you can't load her within two feet of the water.

Q. When the guards have been two feet above water you have towed her alongside? A. Yes, sir.

Q. And it is not an uncommon thing? A. It is; 50
unless she is loaded deep she is never towed alongside.

Q. But she is occasionally loaded deep and therefore is towed alongside? A. It depends upon which way the captain wants to tow her.

Q. Could she have been towed alongside of the *Wolverton* on this occasion? A. No, sir.

Q. Why not? A. Because she was loaded light; she was not loaded deep enough.

Q. What difference does that make? A. The difference that she would be more in the water if she was loaded deep.

Q. What difference would that make, why couldn't she be towed alongside? A. Because her guards 51
would fetch up against the house.

Q. What house? A. The house of the *Wolverton*.

Q. How far were the guards out of the water? A. She had only eight hundred bags of coffee on to her.

Q. Is that an answer? A. It is.

Q. How high were the guards out of water? A. I never measured from the light water-mark to the guards.

Q. On this occasion how high were the guards above the water; state if you know. A. I don't know.

Q. How do you know then they would have come

52 in contact with the house? A. She was so light that she was way above the *Wolverton's* rails, and her pinions would catch the guards.

By the Court:

Q. The *Atlanta* was at this time too light to be towed alongside? A. The barge was too light—her guards would catch on the house of the tugboat; the guards of the barge would catch on the house of the *Wolverton.*

By Mr. McCarthy:

Q. How far below the decks were these guards?
53 A. They run all the way around the barge.

Q. How far below the deck? A. The beams I think, is eight or ten inches and the beams is put on top of the covering-board, the clamp of the barge—rest right on the clamps.

By the Court:

Q. Don't you know how much your guards projected beyond the hull? A. No, I do not; I never measured them.

By Mr. McCarthy:

Q. Whereabout is the *Atlanta?* A. I suppose in
54 Brooklyn.

Q. We can easily find out then? A. Yes, sir.

Q. She is in the same condition as she was then? A. Yes, sir.

Q. Do you know how far it is from the railing of the tug *Wolverton* to her house? A. I do not.

Q. That is the gangway—do you know how wide the gangway is around the *Wolverton's* house? A. No.

Q. Was the *Wolverton* a small tug? A. A middling sized tug; I never seen her only that day she towed me so I can't form any opinion.

Q. When you say the tide was half ebb, do you

mean it was a strong tide? A. It was half the ebb 55
tide.

Q. That is very strong, isn't it? A. It is half the ebb tide.

Q. It is a strong tide, isn't it? A. That depends a good deal on the wind; the wind controls the tide a good deal.

By the Court:

Q. Don't you know whether the tide was strong or not? A. It was half ebb; I couldn't tell whether strong or not.

By Mr. McCarthy:

Q. How do you know it was half ebb tide? A. I 56
knew the way the boat swung in Brooklyn, by the docks.

Q. And yet you don't know whether it was strong or not? A. It was strong in the middle of the river.

Q. Why don't you answer my question? A. You want me to tell how strong the tide run?

Q. I want to know whether it was a strong tide or not? A. It was half ebb tide, whether strong or else I couldn't tell you; I know how the tide runs off Pier 1, at the Battery.

Q. Give your best judgment as to how fast the tide was running out.

57

Mr. Benedict:

Q. Where do you mean—in the middle of the river or where? A. I don't know how strong the tide runs in the East River.

Q. You don't know then how strong the tide was going? A. No, I do not; I couldn't tell you how many miles an hour it was running; that is the question I suppose you want to get at.

Q. What was the course of the tide at Roberts' Stores when you got out beyond the end of the pier?

58 A. It was ebb; it was setting down towards Governor's Island.

Q. In a pretty strong straight line? A. The set of the tide do you mean—how it sets?

Q. Yes; it sets down pretty straight, doesn't it? A. In shore from Wall Street Ferry to Fulton Ferry; there is an eddy sets up.

Q. When you got out of the eddy and got in the ebb tide, how did it set—did it make straight for Governor's Island, straight toward the island? A. Do you mean the tide sets down towards there, or what way? It sets through Buttermilk Channel and by Governor's Island.

Q. That was the direction? A. Yes, sir.

59 Q. How far out from the end of the pier at Roberts' Stores did this eddy that you speak of extend? A. Not over fifty or sixty feet.

Q. And then you get into the sweep of the tide? A. Into the sweep of the tide, yes, sir.

Q. Was the *Atlanta* easily steered? A. A fine steering barge—had a clean run.

Q. Could you, under all circumstances—no matter whether you were going against the tide or with the tide or whether you were cutting across the tide—keep her directly in the wake of the tug hauling it? A. Yes, sir.

Q. You could always do that? A. Yes, sir; unless once in a while she got out of the eddy in a strong

60 tide.

Q. If the barge *Atlanta* yawed then one way or the other from the course of the tug hauling her it would be the fault of the person steering the *Atlanta*, would it? A. It would; certainly it would; you steer right directly after the tug.

Q. You understood the question, didn't you? A. If the tug yawed one way or the other——

Q. I said, if the *Atlanta* yawed one way or the other from the course the tug had pursued, it would be the fault of the *Atlanta*, wouldn't it? A. Yes, sir.

Q. In other words, with two men at her wheel

you had power enough over her to steer her in any direction you pleased? A. Yes, sir; in any direction. 61

Q. Did this hawser line belong to you or to the tug? A. Belonged to the barge.

Q. How was it fastened? A. Fastened by turns around the bit of the barge.

Q. Do you know how many turns there were in it on that day? A. No, I do not.

Q. Is it a difficult matter to unfasten? A. No.

Q. It can be easily done? A. Yes, just take the turns off the bit and let it go.

Q. It can be done very quickly too, can't it? A. Yes, sir.

Q. You admit, don't you, that there is a clean view from Roberts' Stores to the Battery—nothing to obstruct the view, is there? A. Not as I know of. 62

Q. You would know if anybody, wouldn't you; you can see without difficulty when you are at Roberts' Stores any vessels rounding the Battery from the North River, can't you? A. Yes, sir.

Q. With great ease; and you can see what course a vessel is pursuing, can't you, when you are at Roberts' Stores? A. You can't see unless the vessel is in the East River; you can't see when she is up at South Ferry; do you mean Castle Garden, or South Ferry?

Q. When she is at or opposite the new Barge Office, you can see what her course is? A. No, not till she gets this side of South Ferry. 63

Q. You can't see at the new Barge Office? A. No, sir.

Q. Can you not see a vessel rounding the Battery from Roberts' Stores, when she is opposite the new Barge Office? A. No, sir—you cannot until she gets this side of South Ferry.

Q. Can you not see from Roberts' Stores a vessel two hundred feet off from the Barge Office when she is rounding the Battery? A. Yes, sir; you can, if she is off in the river.

Q. If she is two hundred feet off from the new

64 Barge Office you can then see her from Roberts' Stores, can you not? A. Do you mean from the dock or from the barge—that is the question I want to answer.

Q. From the ends of the pier—suppose you are on the barge or on the end of the pier—I don't care which? A. If she is out in the middle stream you can see her from the end of the dock.

Q. I said if she is off two hundred feet? A. I couldn't tell you.

Q. How far do you call it from Roberts' Stores to the place where the collision occurred? A. I couldn't tell you the distance.

Q. According to your best recollection, was the
65 place of collision to the westward of the new Barge Office or to the eastward of it? A. It was to the westward.

Q. That is, it was between the new Barge Office and Castle Garden? A. Yes, sir.

Q. If you were to draw a straight line from the new Barge Office out into the bay, how far to the westward of that straight line would you say the collision occurred; how many feet?

Mr. Benedict: A straight line into what part of the bay?

Q. Draw a straight line from the new Barge Office out into the bay? A. And you want to know how far off the barge was to the westward of it, or was
66 the barge to the eastward or westward of it?

Q. Yes? A. It is just a little to the northward of the Barge Office where she struck.

Q. How many feet would it be to the northward and westward of that line? A. It wouldn't be over a hundred feet—about a hundred and fifty feet.

Q. That is a hundred feet towards Castle Garden? A. Yes, sir.

Q. How far do you call it from Roberts' Stores to the point where the collision occurred? A. I don't know.

Q. From Roberts' Stores to the point where the

collision occurred what was your course? A. I 67
couldn't tell you—we had no compass on the barge.

Q. Can't you give me any judgment about it? A. No, I could not; we had no compass; I couldn't tell you.

Q. Can't you without the compass give me some notion; was it W., or W. by N., or W. by S.? A. W. by N., I guess.

The Court: By course, you mean simply the direction?

Mr. McCarthy: Yes, sir.

Q. So far as you can state, what was the course taken by the *Wolverton* after she left Roberts' Stores? A. You want to get the course of the *Wolverton* after she left Roberts' Stores? 68

By the Court:

Q. What course did she actually take, if you know? A. She gave the Battery a good wide berth.

By Mr. McCarthy:

Q. What course did she take? A. Course by the compass, is it?

Q. How, to the best of your knowledge, did the *Wolverton* head—directly for the Battery or a point midway, in starting from Roberts' Stores?

By the Court:

Q. When she got out in the stream how was she heading? A. Right straight down for the New Jersey Dock—the Central Railroad of New Jersey, about that way. 69

Q. That is, as you got out from Roberts' Stores? A. Yes, sir; she straightened up with the hawser.

By Mr. McCarthy:

Q. She headed then down the middle of the river? A. Yes, sir.

Q. (Showing witness a chart.) You say you headed about here, for Communipaw Ferry? A. Yes, sir.

70 Q. And you place the point of collision where? A. Off the Custom Gap, off the Barge Office.

Q. How far from that? A. How far was she from it?

Q. How far off was the collision? A. Two or three hundred yards; I couldn't be positive; I was all excited, and just run and left the wheel, and I couldn't take the dimensions for all these figures.

Q. You said on your direct-examination that it was about in the middle of the river? A. Yes, that is about two or three hundred yards off.

Q. That is what you mean when you say the middle of the river? A. Yes, sir.

Q. What is your notion of the distance between the
71 new Barge Office and Governor's Island? A. The distance you want to get at?

Q. Yes? A. I think it is half a mile or more.

By the Court:

Q. You have said you thought the collision occurred about two or three hundred yards from the Barge Office? A. Yes, sir.

Q. Now, in order to get some idea of your estimate of yards and distances, you are asked how far it was? A. About half a mile.

Q. You say you were about two or three hundred yards off; how many hundred yards do you think it is all the way across? A. Fifteen hundred or two
72 thousand yards all the way across.

By Mr. McCarthy:

Q. You didn't hear any whistles from the *Packer*? A. No, sir.

Q. Do you think you would have heard them if they had been blown? A. Certainly—pilot-house all open and two men to hear it.

Q. You would have heard them if they had been blown? A. Yes, sir, I would.

Q. Suppose two whistles had been blown from the *Packer*, would you have done anything else than

what you did? A. I would have steered right after the tugboat. 73

Q. You would have done that any way? A. Yes, sir; steered right after the tug.

Q. Now, I want you to tell me as nearly as you can, how far away the *Wolverton* was from the *Packer* when you first saw the *Packer*? A. I think she was all of two hundred yards.

Q. When you first saw the *Packer*? A. Yes, sir.

Q. And you were the length of the hawser still further off? A. Yes, sir.

Q. Did you observe whether after that time the *Wolverton* made any change in her course? A. I seen the *Wolverton* change—put her wheel to port, and as soon as he did I put my wheel to port. 74

Q. How long was that after you saw the *Packer*? A. I suppose it couldn't be over two or three minutes.

Q. You said on your direct-examination that the *Packer* was heading in? A. She was.

Q. And trying to get between the *Wolverton* and the New York shore? A. She was.

Q. Was that before or after the *Wolverton* changed her course? A. The *Wolverton* changed her course and the *Packer* was trying to get inside of her.

Q. Which was first? A. The *Wolverton* changed first.

Q. Do you mean by that that the *Wolverton* changed before you did? A. Certainly. 75

Q. That wasn't my question. You observed, did you not, that the *Packer* was heading in and trying to get between the *Wolverton* and the New York shore? A. Yes, sir.

Q. You also observed that the *Wolverton* ported her wheel. A. Ported her wheel; yes, sir.

Q. Which was done first, if you know? A. I couldn't tell you whether the *Packer* changed first or the *Wolverton*.

76 By the Court:

Q. When you first saw the *Packer* which way was she heading? A. In towards the Battery, in towards the East River.

Q. In towards shore, you mean? A. Yes, sir.

Q. Not merely that she was rounding the Battery? A. I mean she was heading in.

Q. Heading in towards the pier? A. Heading in towards the pier.

Q. Not merely rounding the Battery? A. No, sir, she was heading in.

By Mr. McCarthy:

77 Q. That was before the *Wolverton* ported her wheel, wasn't it? A. She was heading inshore—the *Packer* was.

By the Court:

Q. Before the *Wolverton* ported her wheel was the *Packer* already heading in towards the pier? A. Yes, sir, she was.

By Mr. McCarthy:

Q. When you first saw the *Packer* she was thus heading in? A. Yes, sir; she was heading in.

Q. Did you observe whether the *Packer's* tow was heavy or not? A. Only one canal-boat—loaded
78 canal-boat.

Q. That is not an answer to my question. Did you observe whether she was heavy or not; what was your judgment, if you formed any? A. I see her only with one canal boat; that is all I seen her with.

By the Court:

Q. At the time did you make any observation with regard to the tow of the *Packer*, as to its being heavy or not; did you think anything about it? A. No, sir.

By Mr. McCarthy: 79

Q. Did not the *Wolverton* after she took you in tow at Roberts' Stores head directly across the river making for Pier 5 or about that locality? A. She come right down the middle of the river; the *Wolverton* came right straight down the river.

Q. Repeated. Did not the *Wolverton*, after she took you in tow at Roberts' Stores, head directly across the river making for Pier 5 or about that locality?

Mr. Benedict: I object; those are two entirely different things.

Question allowed.

A. No, she did not. 80

Q. Wasn't the *Wolverton*, after she took you in tow, heading across the tide? A. Not till she got to the Battery she wasn't.

Q. After she took you in tow? A. No, she was coming with the tide.

Q. After she took you in tow she was not heading across the tide? A. She had a little tide on her starboard bow certainly.

By the Court:

Q. Were you not heading across the tide? A. We were coming with the tide and partly across the tide in the North River.

81

By Mr. McCarthy:

Q. Which was it, or was it both, coming with it or across it? A. With it, and we were crossing the tide too till we got to the Battery.

Q. Isn't it true that if you were heading across the tide the barge *Atlanta* would inevitably swing off more or less from the course of the *Wolverton*? A. No; she would keep right straight after her.

Q. Even though you were crossing the tide? A. Yes, sir; till she met the two tides.

Q. Please explain how it is that, if, when you

82 first saw the *Packer* she was heading in for the Battery, she could have been on your port side four points?

Mr. Benedict: I submit that does not need any explanation.

Question allowed.

Q. Handing witness a paper. Please indicate on this paper the position of Roberts' Stores, of Governor's Island, of the Jersey shore, Communipaw Ferry, and mark where you think the *Wolverton*, the *Packer* and the *Atlanta* were when you first saw the *Packer*? A. The witness does as he is requested.

83

By the Court:

Q. You were on a hawser? A. Yes, sir.

By Mr. McCarthy:

Q. I wish to repeat a question that I put to you. How far do you say the *Packer* was from the New York shore at the time you first saw her? A. Two or three hundred yards.

Q. And how far was the place of collision from the New York shore? A. Two or three hundred yards I reckon.

84 Q. Then the *Packer* had not made in any for the New York shore from the time when you first saw her? A. Yes, she was making in when I first see her.

Q. Then the place of collision must have been nearer the New York shore somewhat? A. Yes.

Q. Didn't you say it was two or three hundred yards? A. Yes, sir.

Q. Are you very sure that the *Packer* did not stop and reverse before the collision? A. That I couldn't answer you.

Q. Are you very sure that the *Packer* and her tow were not actually going backwards at the time

of the collision? A. They were coming ahead; I seen the water. 85

Q. Please answer my question?

Mr. Benedict: The witness has answered the question.

Q. All I ask you is this, and I want a direct answer and not an argument; are you sure the *Packer* was not going back at the time of the collision? A. That I couldn't tell you, but the water was breaking on to the bow of the canal-boat.

Q. Either going back by the land or going back through the water? A. She was not going back, she was coming ahead; I seen the water breaking on to the bow of the canal-boat; I couldn't tell whether the engines were reversing; but the water was breaking on to the bow of the canal-boat. 86

Q. That might be if she was going back, as fast as the tide was running, might it not? A. The tide wouldn't be breaking that strong under the canal-boat's bow.

Q. How fast, in your judgment, before the collision was the *Wolverton* and her tow going? A. I should judge four or five miles an hour.

Q. If only four miles then you were not under head-way at all, were you? A. Certainly; we were under good steerage-way.

Q. Assume it to be a fact that the tide was running at least four miles an hour, at what rate of speed were the *Wolverton* and her tow going past the land just before the collision? A. I couldn't tell you. 87

Q. How fast were you going through the water—the *Wolverton* and her tow? A. Do you want me to tell you how fast the boats were going?

Q. You can understand my question; I want you to answer it? A. You don't ask it in the right way.

Q. Before the collision how fast were your tug and tow going through the water? A. Five or six miles an hour.

Q. Do you wish to correct your previous answer?

88 A. That is what I suppose she was going; I can't form any idea how fast she was going.

By the Court:

Q. Are you speaking of through the water or by land? A. Through the water.

By Mr. McCarthy:

Q. Were you at any time near enough to the *Packer* to hear her bells ring and her jingle? A. No, sir.

Q. How far, in your opinion, when you first saw the *Packer* was the *Wolverton* from the New York shore? A. Two or three hundred yards.

89 Q. How far was the *Atlanta* from the New York shore when you first saw the *Packer?* A. The same distance as the *Wolverton.*

Q. Then, in your judgment, or in your opinion, rather, all three vessels were about at an equal distance from the New York shore when you first saw the *Packer?* A. They were; yes, sir.

Q. How far was the *Wolverton* from the *Packer* when you first saw her? A. Two or three hundred yards I have told you.

Q. They were two or three hundred yards apart? A. Yes, I have told you that repeatedly.

Q. Is it knowledge on your part or merely your best guess? A. Best guess.

90

By the Court:

Q. At the time when you first saw the *Packer,* and, as you say, there were two or three hundred yards distance between the *Wolverton* and the *Packer,* how was the *Wolverton* heading with regard to the shore? A. She was heading in shore—right up the North River, quite direct up the North River.

Q. Do you remember how the *Wolverton* was then heading with regard to the shore? A. Abreast of the *Packer.*

Q. How was the *Wolverton* heading with regard 91
to the shore? A. She was heading right up along the shore, straight.

Q. You think she was heading parallel with the shore, right along the same way the shore was? A. The same way as the shore, yes, sir; diagonally to Jersey City

By Mr. McCarthy:

Q. Then I understand you to say the *Wolverton* and your tow had crossed the East River? A. Yes, sir.

Q. And you had got within two or three hundred yards of the New York shore before you saw the 92
Packer? A. I couldn't answer that question.

Q. Why not? A. I don't know.

Q. Perhaps you didn't understand it; I will repeat it: Then I understand you to say the *Wolverton* and your tow had crossed the East River and you had got within two or three hundred yards of the New York shore before you saw the *Packer*? A. I can't answer it; my memory fails me.

Q. Now on another point; have you knowledge or is it only guesswork when you say that the hawser was fifteen fathoms in length? A. The hawser—the line was bought new——

Q. Never mind about that; please answer my question? A. I will; put it to me right and I will 93
answer.

Q. I ask you simply this: Do you know, or is it only guesswork, that the hawser was fifteen fathoms in length; can you tell me that? A. The line was bought new from Van Winkle's two or three days ahead of the accident, and I gave it to the *Wolverton* to tow me; there were twenty fathoms in the line, and I gave him fifteen fathoms between my boat and him in my judgment; between making fast on the *Wolverton's* bitts and the barge's bitts it takes a good deal of line for the two boats.

Q. Then you know it was only fifteen fathoms or

94 about that between you? A. About that; the line was twenty fathoms when it was bought.

Q. Did you buy it yourself? A. I carried it from the ship chandler's.

Q. Did you measure it? A. I did in Van Winkle's, when it was bought; we measured off the line, and it was twenty fathoms as near as I can guess at it.

Q. If you measured it why do you guess? A. It is but a rough estimate with the arms stretched out (illustrating); that is what we call a fathom, it is a nautical phrase for it.

Q. What did you do when you saw the *Wolverton* port her wheel? A. Ported my wheel, lashed it
95 hard a port and got out of the pilot-house, and hailed the *Packer* to go back; me and my mate hailed him.

Q. Haw far away was she when you hailed her? A. She was all of a couple hundred feet as near as I can give it—I suppose so.

Q. Had the *Wolverton* slackened her speed at all up to this time? A. That I couldn't tell you.

Q. You don't know that? A. No, I hadn't charge of the engine.

Q. How did it happen that if your barge was following in the wake of the *Wolverton* that the *Wolverton* escaped the collision, and you did not? A. The *Packer* would cut the *Wolverton* in two, but he
96 escaped—the *Wolverton*.

Q. He didn't cut the *Wolverton* in two? A. He came very near doing it and he ketched me.

By the Court:

Q. How did the *Packer* come to catch you and not the *Wolverton* if you were going in a line; can you explain that? A. Yes, sir (illustrating); I ported my helm, like that, and he comes right square head into me.

Q. You mean the *Packer* caught you because the *Packer* was steering towards the land—towards the New York shore? A. Yes, sir.

By Mr. McCarthy: 97

Q. In other words, you were caught by the *Packer's* tow and the *Wolverton* was not, because the *Packer* was heading in towards the New York piers; is that it? A. Yes, sir; if I had kept right straight on without changing my course I would have cut the canal-boat in two.

Q. You would have escaped the *Packer's* tow but for the fact that the *Packer* starboarded her wheel and went in towards the New York piers at the time when the *Wolverton* ported her wheel, is that it? A. I can't answer the question.

Q. That is the reason then, generally, because the *Packer* was making in for the New York shore; is that it? A. I was right after the *Wolverton* all 98
the time; the *Wolverton* ported his wheel and widened him at the time, and by my porting my wheel I tried to widen him too, but he ketched me.

Q. And yet all this time your barge was as near the New York shore as the *Wolverton* was? A. Yes, sir.

Q. How were you lying at the Brooklyn pier before you were taken up by the *Wolverton?* A. On the north side of Roberts' stores, head in.

Q. How did she bring you out? A. Stern first.

Q. When brought out did you sag below the pier with the tide before she got control of you? A. I couldn't tell you.

Q. She brought you out stern first by a hawser 99
line attached to the stern or bitts? A. The bowof the tugboat to the cleat of the barge.

Q. Did the tugboat back out? A. Yes.

Q. When she hauled you out did she do it by reversing? A. Yes.

Q. Then she had to let go and take a new hold of you? A. Yes, took hold forward.

Q. And didn't you, in the meanwhile, sag down the stream? A. I couldn't tell you.

Q. You have no recollection of that? A. I paid no attention to it at all.

100 Q. Were you not as far down as the Wall Street Ferry slip when the tugboat really straightened out on her hawser and began to haul you ? A. I couldn't tell you.

Q. You have no recollection of that? A. No recollection of that.

Q. Now when you first saw the *Packer* was she rounding the Battery or was she in full view; did you see the whole of her at first glance or did she come gradually into view? A. I saw the whole of her at once.

Q. Why didn't you see her before? A. Because I was steering after the *Wolverton;* I don't look one side or the other.

101 Q. You say that your mate first called your attention to the *Packer?* A. Yes, sir.

Q. He was standing in the same place as you, he was standing on the port side of the wheel and you on the starboard side? A. Yes, sir.

Q. Was there a pilot-house over you? A. Yes, sir.

Q, And there were windows in the pilot-house? A. Four windows, and one aft, made five.

Q. You are quite confident that if the *Packer* had blown any whistles after you saw her you would have heard them? A. I think so.

Q. Are you confident on that point? A. If you give me a chance I will answer; there is so much
102 noise in the exhaust you can hardly hear the whistles.

Q. From what tugboat? A. The *Wolverton;* so much noise my attention was not drawn to it at all. You understand what the exhaust pipe is?

Q. No I don't. Have you discussed that point with any body since recess? A. No, sir; I haven't spoke to any one on the subject; I didn't know it was coming up till Friday.

Q. I mean since recess? A. No, sir.

Q. You are not now positive the *Packer* did not blow two whistles? A. I haven't heard them; I didn't hear no whistles.

Q. Are you very sure that after the tug *Wolverton* hauled you out from the pier at Roberts' Stores she didn't head up the river some little distance before she turned to cross the river? A. I couldn't tell you. 103

Q. You don't remember? A. No, I don't remember.

Q. Are you able to say how you at any time could have been as near the New York shore as was the *Wolverton*, unless she at first headed up the East River and come down parallel with the New York shore? A. I mean the New York shore at the Battery—not up the East River.

Q. At the point of the Battery? A. Yes, sir; that is what I have referred to. 104

Q. I will ask you again: Are you sure that you were going to the Jersey Central Dock in Jersey and not the Erie Dock? A. We were going to the Erie Dock; I said the boat was heading about for Central Railroad in New Jersey.

Q. Then you didn't say you were going to the Central Railroad? A. No, sir; I did not.

By Mr. Benedict:

Q. Supposing that you had cast off the hawser that attached you to the *Wolverton* at the time you saw there was going to be a collision, what would have been the result? A. I would have cut the canal-boat right in two; the *Wolverton* canted the barge's bow in shore. 105

Q. You thought possibly you might avoid the other tow? A. Yes, sir.

FINLEY FRASER, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Benedict:

Q. Where do you live? A. In Brooklyn.

Q. What is your business? A. I am a seafaring man, at present employed in towing.

Q. Do you remember this collision between the

106 barge *Atlanta* and the canal-boat in tow of the *Packer*? A. Yes, sir.

Q. Were you on board the *Wolverton* at the time? A. I was.

Q. What had you to do with her navigation? A. I had nothing to do with the navigation at the time.

Q. Whereabouts were you? A. I was in the pilot-house.

Q. Were you in the pilot-house from the time she started from Roberts' Stores? A. I was in the pilot house from the time she left Pier 10 till she went to Roberts' Stores and took the *Atlanta* in tow.

107 Q. Did you stay there till the collision? A. Yes, sir.

Q. When was the first that you saw the *Packer* and her tow? A. The first thing that called my attention I heard two whistles; I was reading a paper at the time and I looked up and I see the *Packer* about two points on our port bow, heading into the East River.

Q. How was she heading with reference to the course of the *Wolverton*? A. At the time I think she was heading right on towards the port bow of the *Wolverton*, as far as I can remember.

Q. So that when you looked at her what part of her did your eye strike? A. I could see her port

108 side; in fact I could see the whole of her.

Q. Could you see both sides alike? A. Pretty near; but more of the port side.

Q. And how far away was she from the *Wolverton* at that time when you first saw her? A. I don't suppose she was over three or four hundred feet; I was sitting reading a paper and the sound of the whistles drew my attention and I looked up and I saw her there.

Q. Did you have to get up to look out? A. No, sir; I wasn't required to look out, but naturally a man would.

Q. Were you sitting down so low that you could not see her? A. I could see all round. 109

By the Court:

Q. She was then about 300 feet off? A. Yes, sir; in my judgment of distances.

Q. How far would you call it from here to City Hall corner? A. I should call it about that distance; that is about the distance she was when I saw her—that is a rough estimate; distance is very deceiving on water.

Q. Did you say where you were at that time—off what point of the New York shore? A. I believe we were about off Pier 1 or 2 at the time, East River. 110

By Mr. Benedict: Were those whistles answered? A. No, sir.

Q. By the Court: Did you give any whistles? A. No, sir.

Q. You heard the *Packer's* whistles? A. Yes, sir; two.

By Mr. Benedict: Was there any answering whistle blown from the *Wolverton?* A. I believe not.

Q. What was done, if anything, on the *Wolverton?* A. The captain used his own judgment in that respect.

Claimant's counsel moves that the answer be stricken out. Motion granted. 111

The Witness: There was no answer at all that I remember of from the *Wolverton.*

Q. Was there anything done in the pilot-house with the wheel? A. I can't tell that because I didn't have any control on the boat.

Q. I didn't know but you might have seen something? A. No, sir; I don't remember.

Q. You don't remember whether there was any change of his wheel? A. I can remember I didn't pay any attention.

Q. Do you remember whether there were any bells

112 rung to the engine on the *Wolverton?* A. I couldn't be positive whether there was or not; there might have been; but I couldn't be positive.

Q. From the time when you first saw the *Packer* will you state what course she took? A. She was heading up the East River.

Q. Did you see any change in her course? A. When I stood up to look I see two men in her pilot-house putting her helm to starboard in order to cross the *Wolverton's* bow.

Q. Did you see whether that affected the direction of the boat herself—whether she swung any? A. No, sir; I don't believe she did; she might; I don't think so.

113 Q. How close to the *Packer* did the *Wolverton* pass? A. I don't think she was any more than two lengths; that is at the time of the one boat passing the other.

By Mr. McCarthy:

Q. Two lengths of what boat? A. Lengths of the *Wolverton.*

Q. You don't mean lengths, do you; don't you mean widths? (No answer.)

By Mr. Benedict:

114 Q. How long do you call the *Wolverton?* A. She was sixty-five feet over all.

Q. Then two lengths would be 130 feet; do you think it was as much as that? A. You must make allowances for the ebb tide sweeping down,

Q. Do you think there was as much distance as that between the two boats when they passed? A. I don't give that as a fact; I say there might be that distance.

Q. What is your best judgment—in feet? A. Probably might be about seventy-five feet; there was over a length, I should judge.

By the Court: 115

Q. Were they as far apart as the length of this room, do you think? A. Just about that, not any more—that is, when the two boats were abreast of each other; that is, the tide sweeping down on the *Packer* at the time, of course naturally swung them all the time closer together.

Q. Did you look to see how the barge was coming with reference to the *Wolverton*—as to whether she was following or not? A. I didn't pay any attention at the time, but naturally supposed that the captain——

Objected to.

Q. I don't care what you supposed; I want what you saw? A. I didn't pay any attention to that. 116

Q. Did you look at the boats till they came together? A. The first thing that I knowed the hawser parted; I seen the *Packer* forging ahead and striking the *Atlanta*, and the hawser parted from the *Wolverton*.

Q. From the time when you saw the *Packer* did you keep your eye on her until the vessels struck? A. I did.

Q. What made the hawser part? A. The force of the blow, the *Packer* striking her,

Q. At that time do you remember how the barge *Atlanta* was with reference to the stern of the *Wolverton*—as to whether she was on either side or right astern? A. To the best of my belief—— 117

Objected to.

Q. Did you notice at the time of the collision whether the barge *Atlanta* was heading directly after the *Wolverton* or whether she was heading on either side? A. She was following the *Wolverton*. Will you let me explain?

Q. No. You didn't answer whether you noticed or not? A. I did.

Q. How was it when you did notice? A. I was watching the *Packer* at the time—if you will allow

118 me to explain—and the *Packer* forging ahead, I looked back and see the *Atlanta*. The tide was sweeping her down just a little on our port quarter, but very slightly. That is the way I understand it, and that is the way I saw it.

CROSS-EXAMINED by Mr. McCarthy:

Q. Did the *Wolverton* make any change in her course after the *Packer* blew two whistles? A. I can't say.

Q. You were in the pilot-house? A. I was in the pilot-house.

Q. Did she port her wheel or starboard her wheel, or do anything of that sort? A. I don't remember.
119 I had no control of anything.

Q. You were there in the pilot-house? A. I was merely there incidentally.

Q. Where do you live? A. At present I reside in Adams street, Brooklyn—195.

Q. How long have you resided there? A. A year.

Q. Do you rent or own the house you live in? A. I rent.

Q. Where is your place of business? A. I have no particular place of business. I am towing on the river.

Q. On what tug are you? A. I am captain of the tug *White & Price*.

Q. How long have you been on her? A. Since she
120 was built.

Mr. Benedict: How is this material?

By The Court:

Q. How long is this? A. Since last September.

By Mr. McCarthy:

Q. Where is her office—in New York? A. She has got no office.

Q. Have you any place of business in New York? A. No.

Q. Have you an interest in her?

Mr. Benedict: I submit that that is not material. 121
A. I will answer that in my own way, and perhaps you will understand me.
Mr. Benedict: I object to the witness answering.
Q. Who was the pilot of the *Wolverton* at that time? A. Walter L. Shultz.
Q. Where is he? A. I don't know where he is. He is in New York somewhere.
Q. When have you last seen him? A. I seen him last week.
Q. How long had he been pilot of the *Wolverton* before that collision? A. Three days.
Q. How long did he remain pilot of her after the collision? A. Till about the next day.
Q. Did the *Wolverton* remain in port or go away 122
from here? A. She went away from here.
Q. At what time—the day after the collision? A. I believe it was.
Q. What time during the day? A. About noon.
Q. Where did she go? A. Philadelphia.
Q. And she was there libelled for seamen's wages, wasn't she? A. She was libelled, I believe.
Q. For seamen's wages? A. That I don't know. I had no control of her.
Q. And sold? A. And sold.
Q. And no defense put in? A. I don't know. She was under the hands——
Q. You didn't put in any defense? A. I didn't put in any; no. 123
Q. And the vessel was sold? A. She was sold and she was under the control——

By the Court:

Q. Were you connected with the *Wolverton?* A. At the time I was.

By Mr. McCarthy:

Q. You were the registered owner of the *Wolverton*, were you not? A. Yes, sir; but there was claims from Neafie & Levy—they had control of the

124 boat and she was in an agent's hands; I had nothing to do with her until such times as she paid a bill of expense she owed for putting in a new boiler and for a thorough overhauling.

Q. They had a mortgage on her? A. She was owned by them subject to an agreement between them and me that when that debt was paid the boat would revert to me, but at the time I had no control over her because they had placed her in an agent's hands with my consent.

Q. Who hired Schultz to be her pilot? A. The agent.

Q. Who discharged him? A. That I can't tell; I guess he discharged himself.

125 Q. Who took her to Philadelphia? A. I did, by the agent's orders.

Q. In whose name was the vessel registered? A. At that time?

Q. Yes. A. Neafie & Levy; they held a bill of sale of her.

Q. Wasn't she registered in your name? A. They had a bill of sale in Philadelphia, and she was registered as belonging to them.

Q. Wasn't she registered as belonging to you? A. She was here in New York.

Q. And you were the registered owner? A. In New York I was, but in Philadelphia——

Q. Never mind Philadelphia. You were the reg-
126 istered owner of her here in New York? A. In New York I was, but not at that time; she was registered in Philadelphia previous to that collision; Neafie & Levy owned her.

By the Court:

Q. Do Neafie & Levy belong in Philadelphia? A. Yes, sir.

By Mr. McCarthy:

Q. Who was it employed Neafie & Levy to put in this boiler?

Objected to. Objection overruled.

A. I did. 127

Q. Did they have any interest in the boat before you hired them to put the boiler in? A. No, sir.

Q. You were the owner, were you not? A. I was.

Q. What was the boat worth? A. At the time?

Q. Yes? A. Before or after the boiler was put in?

Q. After the boiler was put in? A. I estimated the boat worth $6,000.

Q. What was their price for putting in the boiler? A. I owed them a bill——

Q. (Repeated.) What was their price for putting in the boiler? A. They done more than the boiler.

Q. What was their whole bill for what they did? A. A little over $2,900.

Q. And you gave them a mortgage or bill of sale 128
on her to cover that bill of $2,900; that is the fact, isn't it? A. Yes, sir; and I had no control over her——

Q. Never mind that. Then you were the equitable owner of whatever she was worth over and above the $2,900? A. Yes; I believe so.

Q. Have Neafie & Levy ever paid anything on account of her since she was sold in Philadelphia? A. No, sir.

Q. Nor anybody else? A. No.

Q. Were you present at the time she was sold? A. No.

By the Court: 129

Q. Do you know where she is now? A. I do not.

Q. Don't you know who is running her? A. I do not.

By Mr. McCarthy:

Q She has not been in the Port of New York since the collision, has she? A. I haven't seen her for two months since before she was sold.

Q. She has not been in the Port of New York since the collision, has she? A. Not to my knowledge.

130 Q. Had you ever been connected with the management of a tug before the time of this collision? A. I managed the *Wolverton* when she belonged to me; I managed her previous to this agreement between Neafie & Levy and myself.

Q. Never mind that. You managed the *Wolverton* for how long a time before this collision? A. From the time I bought her up to the time the repairs were made.

Q. How long was that? A. About eight months.

Q. Were you her captain or pilot? A. No, sir.

Q. What I asked you was, whether you had ever managed the navigation of the tug, or managed the tug yourself? A. Oh, now I understand you; I
131 didn't understand you before. I did not.

Q. You didn't have anything to do with it? A. Not previous to that.

Q. At the time of the collision did you know anything about the management of a tug? A. I believe I did.

Q. So that you would be able to say whether one thing was right or another thing wrong? A. Yes, sir.

Q. Do you know what is the signification of whistles blowing—one or two or a series of whistles? A. Yes, sir.

Q. Did you know what bells meant—to ring to back or ahead, or anything of that sort? A. I
132 ought to.

Q. When do you say this collision occurred—what time in the day? A. I think it was somewhere about four o'clock in the afternoon; in that neighborhood.

Q. How was the tide? A. It was running ebb.

Q. Was it a strong or weak tide? A. Medium.

Q. How many miles an hour was it running in the middle of the river? A. I suppose about three miles —a medium tide.

Q. How was the tide—was it full ebb, half ebb, or the beginning of the ebb? A. That I can't remember.

Q. What would be a half ebb tide in the middle of

the river—how many miles an hour? A. It depends upon what part of the river you mean. 133

Q. Take the middle of the river opposite Roberts' Stores, or between the Battery and Governor's Island—the half ebb? A. That is the strongest part of it.

Q. What would it be? A. The forepart is the strongest part.

Q. Take it half ebb—what would it be per hour? A. About three and a half or four to the best of my opinion.

Q. Just before this collision, how fast was the *Wolverton* going through the water? A. About five miles.

Q. Through the water? A. Through the water; yes, sir. 134

Q. Do you recognize the fact that there is an eddy on the Brooklyn side when the tide is ebbing? A. I do.

Q. And there is also an eddy on the New York side? A. Yes.

Q. How far out does the eddy on the New York side extend? A. Only a short distance.

Q. I don't know how much that is; what do you call it? A. In New York it depends altogether on whether you are above Fulton Ferry or below Fulton.

By the Court:

Q. Take it near the place of collision, along by the South Ferry slips? A. I don't consider there is very much of an eddy there; there is close to the docks, but when you go out about 150 feet or 100 yards from the dock, I don't consider there is any eddy. 135

Q. The tide doesn't run as strong a hundred yards out as it does further out? A. No, sir; still I don't consider it an eddy only when there is a tide sweeping the other way; of course, the tide doesn't run so strong.

Q. How about the Brooklyn shore at Wall Street Ferry and Roberts' Stores? A. It doesn't run so strong there as it does on the New York shore.

Q. Were you in the pilot-house of the *Wolverton*

136 when she fastened on the *Atlanta* and hauled her out? A. Yes, sir.

Q. After she hauled out the *Atlanta* she let go, didn't she, in order to take a new hold? A. Yes, sir.

Q. Did the *Atlanta* then sag down the stream any? A. I don't know; I don't remember.

Q. You have given testimony in a similar case, haven't you? A. Yes, sir.

Q. Involving to some extent this collision? A. It is some time ago; but I had no information I was to be called on here and I dropped the subject and didn't think any more about it. It was a dead loss to me.

137 Q. You don't remember, then, whether she sagged down the stream or not? A No; I didn't pay no attention to her at the time.

Q. After the *Wolverton* took hold of the *Atlanta's* bow, did she, or did she not, haul her up the stream, up the East River? A. She went right across, across stream.

Q. She went directly across the stream? A. You can't call it right across; she made for about Pier 5.

Q. Pier 5 on which side? A. On the New York shore, so as to make an allowance for the ebb tide; I would, if I was taking——

Q. I don't care what you would do. You say so as to make allowance for the ebb tide; wouldn't the

138 natural tendency of the ebb tide be to swing the barge *Atlanta* a little more down the stream if, as you say, the *Wolverton* was heading for Pier 5 on the New York shore? A. It depends altogether how fast she is going; if you are going fast enough you can keep the *Atlanta* in the same wake as the *Wolverton.*

By the Court: After you got out of from Roberts' Stores the *Wolverton* made for Pier 5, did she? A. She headed for about that and was making allowance for the ebb tide so that would fetch her when she got across about Pier 1 and 2; the tide sweeps her down.

Q. But her actual heading was for about Pier 5 when she left Roberts' Stores? A. When she first left Roberts' Stores. 139

By Mr. McCarthy:

Q. The question I put you was whether or not, heading, as she did, for Pier 2, running into the ebb tide, the *Atlanta* would naturally swing down more or less from the course of the *Wolverton?*

Objected to.

Q. Were you paying any attention to the course of the *Atlanta*, that is, the barge behind you, before the collision? A. When we left Roberts' Stores; but after we left there some time I took a paper up and commenced to read it and at the time of the collision, at the time I heard the whistles, I was reading the paper at the time; I took the paper up about the middle of the river. 140

Q. When your tug was in the middle of the river? A. Yes, sir.

Q. Had you, up to that time, observed the *Atlanta?* A. Yes, sir; coming out of the slip and after we left Roberts' Stores, of course, I did after we got away and the captain had laid his course——

Q. After your tug got in the middle of the river, you didn't observe the *Atlanta?* A. No, sir; I didn't pay no attention then, not till such time as I heard the whistles. 141

Q. Did you, as a matter of fact, observe that the *Atlanta* yawed below the course of the *Wolverton* at any time?

Objected to.

By the Court:

Q. Did you observe whether the *Atlanta* yawed to the left of the *Wolverton* after you came out from Roberts' Stores? A. I did not observe; but I can form my opinion from the tide.

142 By Mr. McCarthy:

Q. If your tug, the *Wolverton*, was heading for Pier 5, from Roberts' Stores, would not the natural effect of the ebb tide be to cause the *Atlanta* to yaw or to swing down more than below the course of the *Wolverton*, as the tide was and as the boats were going that day?

Mr. Benedict: I object that that is a repetition of a question which has already been asked and answered.

Question allowed.

A. Not at the speed the *Wolverton* was going.

143 Q. You said in response to a question that I put to you when I opened the cross examination that just before the collision the *Atlanta* had swung below the course of the *Wolverton;* how do you explain that? A. I say that the man who was at the wheel on the *Atlanta*--you can always keep a boat after a tugboat if she is going five miles an hour, any man can swing a boat any way; I can or you can if you understand it.

Q. But you haven't yet answered my question; how do you reconcile your two answers; when I began my cross-examination you said that you observed that the *Atlanta* had swung below the course of the *Wolverton* somewhat; how could that have been

144 —what caused that? A. I said at the time, just of the collision when I looked back I seen that she was a little on our port quarter; that is what I said.

Q. How did she get there? A. That just depends altogether upon the way, or how you steer; if I was steering a boat——

Q. Wasn't it the tide that carried her there? A. Probably might be; you can sheer her either way; I know I can.

Q. What course did the *Wolverton* hold from Roberts' Stores to Pier 5, New York? A. We never steer by compass in the harbor.

Q. You had a compass before you then, didn't

you? A. We always carry a compass but never use 145
it in the harbor.

Q. You have already answered that question, haven't you? A. I suppose I have; but I can give it to you as near as I can judge; you must remember I wasn't steering the boat.

Q. What was the course? A. I should say it was about W. by N.

Q. That would bring you right across, wouldn't it —that would bring the *Wolverton* right across the tide?

Mr. Benedict:

Q. At right angles with the tide do you mean? A. I should say from Roberts' Stores it would bring 146
her near the Barge Office.

Q. If you were heading W. by N. for Pier 5 and your starting point was Roberts' Stores, your course would have been across the tide, wouldn't it? A. In a diagonal line; it would be with the tide and across the tide.

By the Court:

Q. You said it would bring you to about Pier 1 or 2? A. Making allowance for the tide, it would bring us just about Pier 1; we went to get in there as close as we could.

By Mr. McCarthy: 147

Q. What is the direction of the Barge Office from Roberts' Stores? A. I can't exactly tell you.

Q. Give it as nearly as you can? A. I guess it was about W. N. W.—either that or in that neighborhood; I couldn't tell you exactly.

Q. You say Pier 5 is W. by N.; now, what would the new Barge Office be? A. I don't know unless —in fact I never gave it any consideration, for we never use the compass around the harbor of New York; we always steer by the points of the land; but we know that from Roberts' Stores to the Barge Office—the Barge Office lays pretty near to the

148 westward, may be a little to the northward.

Q. Did you have a lookout on your tug? A. I didn't have no control of the tug; the captain had charge of the tug.

Q. Was there a lookout on the tug? A. Yes, sir.

Q. What was his name? A. A deckhand.

Q. What was his name? A. I can't remember; his first name was Thomas; I can't think of his other name—Thomas Taylor.

Q. Will you say of your own knowledge that there was a lookout on your tug at any time from the moment she left Roberts' Stores till the moment of the collision? A. I wouldn't say anything of the kind; I say there was a lookout at the time of the
149 collision; I saw the man standing on the deck looking, forward; I didn't have no control of the tug; I was reading the paper and how can I say so?

Q. And you wouldn't say so? A. No, sir.

Q. Did you see the *Packer* as soon as your pilot Schultz saw her? A. I don't suppose I did.

Q. I don't ask for your supposition. A. I don't know when he seen her; I am telling you when I seen her.

Q. You don't know then? A. No, I don't.

Q. Did you call his attention to her or did he call your attention to her? A. He didn't call my attention to her.

150 By the Court:

Q. I understood you to say the *Packer's* whistles first called your attention? A. Yes, sir.

By Mr. McCarthy:

Q. At that time how far, in your opinion, was the *Packer* from the New York shore? A. That I couldn't answer.

Q. At that time had the *Packer* rounded the new Barge Office, when you heard her whistles? A. I think she was abreast of it.

Q. When you heard her whistles? A. I think

so, or probably a little more into the East River; but I think she was abreast. 151

Q. Where do you place the collision? A. I place the collision just off South Ferry or Pier 1, somewheres in that neighborhood.

Q. Was not the *Packer* going very slowly? A. At what time?

Q. When you saw her? A. I don't know.

Q. Can you form any opinion or give any answer to the question how fast she was going by the land? A. No.

Q. How far was the *Wolverton* from the New York shore when you saw the *Packer?* In other words, how nigh had the *Wolverton* got to the New York shore when you saw the *Packer?* A. About two hundred yards; about that. 152

Q. And you were heading for what pier on the New York shore? A. Heading for the Barge Office then so as to go around the Battery.

Q. You were heading for the Barge Office? A. That is, heading outside of it.

Q. Which way did the *Packer* seem to be heading when you thus saw her? A. Heading into the East River.

Q. She was heading up then, was she? A. Yes, sir; heading up, rounding the Battery.

By the Court:

153

Q. Which was the furthest off from the shore? A. I believe the *Packer* was; the *Packer* was further off shore.

By Mr. McCarthy:

Q. How much? A. Probably about seventy-five feet or fifty feet when I seen her.

Q. How are you able to say that if you can't tell us how far off from the shore the *Packer* was? A. I am only judging from our own position how far she was off; I say she was two points on our port

154 bow and the distance I should say she would be is about——

Q. I will ask you this question: Suppose the *Packer* had been moored alongside of the Barge Office, instead of being as you may say, two or three hundred yards out from the shore; holding the course the *Wolverton* was, you would then have seen her on your port bow, would you? A. No; she would be on our starboard bow.

Q. If you were heading for Pier 1 or South Ferry? A. We were heading to go around the Barge Office; if she was lashed alongside of the Barge Office we would naturally have her on the starboard bow.

155 Q. In point of fact, if you had looked for the Barge Office itself when you were thus within two hundred yards of the New York shore, wouldn't you have seen the Barge Office on your port bow? A. No, I wouldn't.

Q. At the time you saw the *Packer* what were you heading for? A. We was heading so as to clear the Barge Office.

Q. I am not asking that. What were you heading for, where did you point, if you looked straight ahead what would you see? Heretofore you have said you were heading for Pier 5; now when you got within two hundred yards of New York shore what then did you do? A. We straightened up in order to go
156 around the Battery; I suppose if we didn't go around the Battery we would fetch Communipaw Ferry.

Q. For what point in New York were you heading —for the Barge Office or below it or above it? A. No; we were straightening up so as to go around the Barge Office.

Q. Do I understand you to say that the wheel was starboarded? A. I don't know at all about it; that is the way we were heading, we were straightening up; you must remember at the time I had no control of the boat, the captain had control.

Q. (Handing witness a paper.) Please mark upon

that paper the position of the *Packer*, the *Wolverton* and the *Atlanta* at the time when you first saw the *Packer*, and the directions in which they were heading? A. The witness does as he is requested ( ). 157

The paper is marked Diagram 2, Fraser.

Q. You didn't observe when the wheel was starboarded? A. I didn't pay no attention.

Q. How do you know the *Wolverton* straightened up at all? A. Of course she had to.

Q. Did you see her? A. I seen her head point in that direction so she would clear the Barge Office at the time.

Q. Do you know why the *Wolverton* paid no attention or did not respond to the *Packer's* whistles? A. Only supposition. 158

Q. You didn't observe any change whatsoever in the course of the *Wolverton* upon the blowing of those whistles from the *Packer*? A. I did not; I don't remember of any; there might have been, but I don't remember.

Q. If the *Wolverton* was two hundred yards from the New York shore when you first saw the *Packer*, how far was your barge *Atlanta* from the New York shore? A. She couldn't be very much further; she couldn't be the length of the hawser that we were towing on, because she would be about probably two-thirds of the distance of the hawser from us. 159

Q. And her own length? A. Yes, and her own length; you must take the angling into consideration.

Q. How long was the barge *Atlanta*? A. I don't know really.

Q. She was a good deal longer than the *Wolverton*, wasn't she? A. Yes, sir.

Q. She was a hundred feet long, at least? A. I suppose she was.

Q. And how long was the hawser between the *Wolverton* and the *Atlanta*? A. I don't know; at

160 the time I supposed it to be about twenty-five fathom, because we generally tow with that line—but I don't know.

Q. Call it a hundred feet if you like? A. You can call it anything you like but that is my supposition.

A. If the *Atlanta* was following directly in the wake of the *Wolverton* and the *Wolverton* was two hundred yards from the New York shore—from Pier 1—why would not the *Atlanta* be at least the length of her hawser and her own length besides from the same point? A. From the shore?

Q. Yes? A. I consider she would be—you must take into consideration the angling would bring you
161 a little nearer the New York shore than what it would, if it were direct off.

Q. What was the angling? A. Will you let me explain? You don't mean to tell me the distance from that corner to this, (pointing to two corners on the same side of the court room,) is as far as from that corner to this corner, (indicating the corners of the court room diagonally opposite each other,) do you?

Q. How much further will you put the *Atlanta* from the New York pier than you put the *Wolverton?*

Mr. Benedict: The witness has answered that question.

162 Q. Then I will ask it again. Whatever pier the *Wolverton* was two hundred yards from at the time you saw the *Packer*, how far from that pier was the *Atlanta* at the same time?

Mr. Benedict: That is a very different question.

By the Court:

Q. Take the pier nearest the *Wolverton* at the time you first saw the *Packer*, how much farther was the *Atlanta* from that pier than the *Wolverton;* give it feet or yards? A. Of course she would be—I should say about two-thirds—not positively—of the hawser.

By Mr. McCarthy: 163

Q. Do you speak when you thus answer of the bow of the *Atlanta?* A. Certainly; allowing for the length of the *Wolverton;* if you take it from the bow of the *Wolverton*, you must take that into consideration, too.

Q. Take the position of the *Wolverton* and the *Atlanta* at the time when the *Packer* was first seen; suppose the *Packer* had gone on a port wheel—had blown one whistle and gone on a port wheel—how many feet farther would she have had to go to the right in order to get around the stern of the *Atlanta* than she would have done provided the *Atlanta* had not been there or her hawser either; do you understand that question? A. I understand it; I should say 164 she was about from fifty to sixty feet farther off.

By the Court:

Q. She had to make a circuit of about fifty or sixty feet additional in order to clear the *Atlanta?* A. Yes, sir.

By Mr. McCarthy:

Q. That is your best judgment? A. She might have cleared the *Atlanta* then if she had ported her wheel and kept it there, of course.

Q. You have already said that the *Wolverton* 165 passed the *Packer* seventy-five feet off? A. I said so, I believe; she passed—I said she passed about two hundred yards off, didn't I?

Q. Yes; that is, one hundred and twenty-five feet? A. I afterwards said that probably she passed about seventy-five feet.

Q. Which way do you want it? A. I want seventy-five feet; that is what I think.

Q. How do you explain the fact that the *Atlanta* came into collision with the *Packer's* tow, if the *Wolverton* passed at a distance of seventy-five feet off, since, as you say, the *Packer* would only have

166 to diverge sixty feet in order to clear the *Atlanta* altogether? A. What is the length of the *Atlanta?*

Q. Explain how it is that if the *Wolverton* passed seventy-five feet off from the *Packer* that the *Atlanta* struck her? A. The *Atlanta* is supposed to be over a hundred feet long; she struck her in the centre; suppose she had had sixty feet, wouldn't she have cleared her?

Q. That is not my question. A. That is my answer.

Q. How do you explain the fact that the *Atlanta* struck the boat when the *Wolverton* passed her seventy-five feet off? A. If she had that sixty feet further off of course she wouldn't strike her.

167 Q. Can you make any other answer to the question?

By the Court:

Q. The question is, how did she come to strike her at all; you said she cleared the *Wolverton* seventy-five feet, and didn't clear the *Atlanta* at all; how could she strike the *Atlanta* when she went seventy-five feet off the *Wolverton*? A. Of course the *Atlanta* was on a hawser.

By Mr. McCarthy:

Q. Yet you have already said that the *Wolverton* was going so fast that the person steering the *Atlanta*
168 had perfect control of her? A. I suppose she was; I am only giving what is my opinion from my own experience; at the time of the collision, I don't know, of course.

Q. You are not able to say whether the *Wolverton* changed her course or slackened her speed before the collision? A. I don't know.

Q. Are you able to say whether or not the *Packer* did not stop and reverse before the collision? A. I am able to say that she stopped, but she didn't reverse in time to avoid the collision.

Q. You are able to say she stopped—the *Packer* stopped?

The Court: 169

Q. What do you mean—stopped her speed or stopped her engines? A. She stopped her engines.

By Mr. McCarthy:

Q. Was the *Packer* going ahead at the time of this collision; I don't want your opinion now; I want your knowledge.

Mr. Benedict: Let me suggest that the question be with reference to the boat and not her engines, or else with reference to the engine and not her boat.

The Court: And also with reference to the water or the land.

A. Do you mean by the engines turning over, or what? A. I want to answer the question intelligently, 170 but I want to understand it before I answer it.

Q. I want to know whether that boat you call the *Packer* was going ahead or not at the time of the collision? A. She was forging ahead.

Q. Do you mean through the water or by land? A. I mean through the water.

Q. Was she going ahead by the land? A. I couldn't say.

Q. In point of fact did you not hear before this collision the *Packer's* bells rung to stop and also to go back? A. Yes, sir.

Q. How far apart were the *Wolverton* and the *Packer* when you thus heard the *Packer* ring to stop and to go back? A. Sufficiently apart, providing 171 that she had backed, to avoid the collision.

Q. Never mind that; answer the question, how far apart were they?

By the Court:

Q. Give your best judgment, in feet or in yards? A. Probably a hundred and fifty or hundred and sixty feet; that is a question very hard to answer.

Q. Was she within the length of your own boat? A. She was a little further than the length of this room.

172 By Mr. McCarthy:

Q. I will ask again whereabouts in the river was the place of collision—opposite Pier 1, do you say? A. In that neighborhood.

Q. How far is Pier 1 from the new Barge Office? A. A very short distance.

Q. It is not more than thirty or forty feet, is it? A. O, yes; Pier 1—I should say it was—what I take to be Pier 1; I should say it was more.

Q. How much more? A. The one the ferry is between there.

Q. It is between the two Staten Island ferries, isn't it? A. Which?

Q. Pier 1? A. No, sir; I don't consider that
173 Pier 1.

Q. It is marked Pier 1 on the chart? A. I consider the pier next to the ferry Pier 1.

Q. Do you know where Pier 1 is? A. That is what I call Pier 1.

By the Court:

Q. Which side of it? A. In the East River.

By Mr. McCarthy:

Q. Of what ferry? A. Of South Ferry.

Q. Pier 1 is the pier east of South Ferry? A. I consider it next to South Ferry.
174

Q. Next east of it? A. Yes, sir.

Q. Don't you know that to the westward of Staten Island Ferry is Pier 1—between that and the Barge Office? A. There used to be a pier there called the Barge Office Pier, the old Barge Office, but there is not a ferry slip there now, to the best of my belief.

Q. Then my observation has failed me; I saw Pier 1 this morning and it was to the westward. How many feet do you call that to the eastward of the Barge Office? A. All the ferry slips is between them.

By the Court: 175

Q. How many feet is it to the east of the Barge Office, as near as you can say? A. It is hard to say; about, I should say, a hundred feet anyway, probably more or less; I can't tell; that is my opinion.

By Mr. McCarthy:

Q. Suppose you were to take a position at the Wall Street Ferry Slip on the Brooklyn side, and you took a straight course west by north, wouldn't that carry you below the extreme point of the Battery?

176

Mr. Benedict: Without any tide?

Mr. McCarthy: Say with no water or anything else?

No answer.

Q. Were you reading from your newspaper to the pilot? A. No, sir; reading to myself.

Q. Were you conversing with him? A. No.

Q. Was this Mr. White of whom you spoke yesterday your agent? A. He was appointed by Neafie & Levy.

Q. Will you answer my question? A. He was Neafie & Levy's agent and mine as well.

Q. You said on a former occasion under oath, did 177
you not, that he was your agent? A. I agreed to put the boat in his charge; Neafie & Levy put the boat in his charge with my consent—that is all I had to do with it.

Q. He was paid out of the earnings of the boat? A. Yes, sir.

By the Court:

Q. What was his name? A. H. K. White.

178 By Mr. McCarthy:

Q. Are you prepared to say that if you were on the starboard side of the *Wolverton* you could not have seen the *Packer* at any time before the collision? A. If I was on the starboard side—what do you mean?

Q. Say on the starboard side of her house? A. No, sir; I don't think I could.

Q. Are you prepared to say that at no time was the *Packer* on the starboard bow of the *Wolverton?* A. I am prepared to say she was just where I located her yesterday on the diagram.

Q. That is not quite an answer to my question; that necessarily gives but one position. Are you
179 prepared to say that at no time the *Packer* was on the starboard bow of the *Wolverton?* A. I am prepared to say I didn't see her until the whistles drawed my attention.

Q. Then you are unable to say whether at any time she was on the starboard bow of the *Wolverton?* A. I didn't observe her.

Q. You have given testimony in a case involving some of the facts of this collision heretofore, have you not? A. I gave testimony in Philadelphia.

Q. Before a commission? A. Not on this case.

Q. Did you not testify when you first saw the *Packer* she was a quarter of a mile off? A. I couldn't tell you the distance; I don't remember.

180 Q. Are you willing to say now she was not a quarter of a mile off when you first saw her? A. I am not willing to say the distance at all; I give it as I gave it to you yesterday.

Q. Now answer my question: Did you not testify before the commissioner in Philadelphia that when you first saw the *Packer* she was a quarter of a mile off? A. I am not prepared to say; it is a long time since, and I don't remember whether I gave that testimony or not; I might and I might not; you may read it if you choose and call my attention to it.

Q. (Reading from page 24) "The tug *Packer*

when I first saw her was off near the Barge Office about two points on our port bow and nearly a quarter of a mile off"? A. She might be; I don't know; I couldn't swear to it, and I don't want to swear to it. 181

Q. Would your recollection on that occasion have been as good or better than it is now? A. I suppose about the same; there may some things slip a man's memory—you are liable to that as well as anybody else.

Q. Your attention was first called to the *Packer* by her blowing her whistles? A. To the best of my belief.

Q. Did you not say in reply to this question: "Q. A straight line running W. by N. from Roberts' Stores to the New York shore would strike what pier"? A. I think it would fetch you clear of the Battery Wall. 182

Mr. Benedict: What is the use of that? A. You have it there I suppose; I don't remember.

Q. It is so here. A. That is my opinion I suppose.

Q. And again: "State, to the best of your knowledge, how the east end of the stone pier of the Battery, I mean by the Barge Office, bore from your tug when she, your tug, straightened on the hawser of the *Atlanta* and began to haul by compass"?

Mr. Benedict: What do you mean by compass?

Q. Did you not say in reply to that question: "About west"? A. I didn't say anything about the compass I don't believe, because it is a thing never used in the harbor of New York. 183

Q. It appears here that you answered "about west"? A. Probably, it might be.

Q. Now I ask again: When the tug *Wolverton* straightened on the hawser of the *Atlanta* to tow her across the bay did she not then head about west? A. She might; of course, she must go to the westward if she was going into the North River.

Q. Did you not say in reply to this question: "Give again the position in the river of the *Packer*

184 and the *Wolverton* when you first saw the *Packer*? A. She was on our port bow; the *Packer* was off the new Barge Office and we were off Pier 1, East River, when I first saw the *Packer*"? A. Probably I might.

Q. What was the position of the *Packer* when you first saw the *Packer;* is it true that you were off Pier 1, East River, and the *Packer* was off the new Barge Office? A. I think she was; we were off Pier 1 and she was about abreast of the Barge Office.

Q. A hundred feet away when you first saw her? A. Something in that neighborhood, to the best of my recollection.

Mr. Benedict: Who said a hundred feet?

185 The Witness: What I took to be Pier 1 is next to South Ferry and the ferry slips is between, and probably if you measured them, you would find a hundred feet between them.

Q. I am speaking of what you call Pier 1? A. I call it next to South Ferry.

Q. Did you not say also on that occasion: "I have not been in any business since the collision?" A. I did.

Q. Also: "My agent at the time of the collision was Henry K. White, No. 31 South street, New York;" did you say that? A. Yes; he was my agent and Neafie & Levy's agent at the same time.

Q. You made no such qualification then, did you,
186 as that he was Neafie and Levy's agent? A. I don't remember whether I did or not; he had the control and I didn't have nothing at all to do with it or to say about it at the time.

Q. Did you or did you not, have a lookout on the *Wolverton* stationed forward, before this collision? A. That you had better ask the captain, because I had nothing to do with it.

Q. Can't you tell me? A. I had nothing at all to do with it—the navigation of the boat.

Q. Can't you answer the question whether you did or did not; do you know whether you had or not?

The Court: Ask the witness whether there was any lookout. 187

Q. Was there a lookout on the *Wolverton* before this collision? A. To the best of my belief there was.

Q. No, I don't want your belief; I want a statement from you.

Mr. Benedict: If the witness gives you the best of his belief that is the best you can get.

A. I can't answer it in any other way.

Q. You don't know, do you? A. Not for a fact; I say to the best of my belief there was.

REDIRECT by Mr. Benedict:

Q. If the helm of the *Wolverton* had been put aport, what effect would that have had with reference to changing the position of the *Atlanta*? A. If the helm was aport it would bring the *Atlanta* a little on the quarter. 188

Q. On the quarter of the *Wolverton*? A. Yes, sir.

Q. On which quarter—if your helm was aport? A. A little on the starboard quarter.

Q. I mean which side of the stern of the *Wolverton* would that carry the *Atlanta*? A. By putting the helm aport?

Q. Yes. A. It would bring her a little on the starboard quarter.

Q. If the helm of the *Wolverton* was put to port, which way would that carry the *Wolverton* herself—to the right or to the left? A. By putting the helm aport? 189

Q. Yes? A. It would carry her to the right.

Q. Then if the *Atlanta* kept her same direction, her direction would be towards the left of the *Wolverton*, would it not, instead of to the right? A. Yes, sir.

By the Court:

Q. Suppose the *Atlanta* were exactly astern, in line with the *Wolverton*, and the *Wolverton's* helm is

190 put to port; do you know whether that would immediately affect the stern of the *Wolverton* as regards the stern being in line with the *Atlanta*? A. It would bring her—as soon as the *Wolverton* would straighten up—it would bring her on the port quarter.

By Mr. Benedict:

Q. What I want to get at is this: We know very well by putting the helm to port the bow is thrown to starboard and she immediately goes off in that direction; does it affect the position of the stern itself otherwise than she follows around the starboard after the stern—does putting the helm to port imme-
191 diately change the position of the stern otherwise than following around the starboard? A. Yes, it would.

Q. How does it—which way does the stern go merely from the effect of porting the helm? A. If you keep the helm a-port it would naturally fetch it a little on the starboard side—that is the bow of the *Atlanta;* but if you straighten her up of course she is quite a distance on the port side.

Q. Of course the result of subsequent motion would be to change the position of the boat; do you know whether changing the rudder throws the helm itself on one side or the other of a line she was going on; if you change the helm of the *Wolverton* it immedi-
192 ately throws the bows to starboard, does it not? A. Yes, sir.

Q. Does the port helm of the *Wolverton* throw her stern on either side of that line? A. No.

By the Court:

Q. I want to know whether changing the helm throws the stern of the vessel one side or the other of the line? A. I know there is a difference of opinion about it,

Q. And you think it does not? A. I think it does not.

By Mr. Benedict: 193

Q. If the wheel of the *Wolverton* was put a-port as she went off, would not the effect of her going off be to carry the *Atlanta* on the port quarter so that the *Atlanta* would show on the port quarter? A. Yes, sir; I understand you perfectly well.

Q. The first movement would bring her on the starboard quarter and after that she would be on the port? A. Whatever distance she went to starboard would bring her on the port quarter.

Q. Did you say you heard the bells of the *Packer* ring? A. Yes, sir.

Q. How far away was she from the *Wolverton* when you heard those bells? A. She wasn't so very far away. 194

Q. What bells did you hear? A. I heard bells in the engine room.

Q. Do you know what bells--how many bells? A. I heard bells to stop her and back her.

Re-cross by Mr. McCarthy:

Q. Were the windows of your pilot-house up? A. I don't remember; but we never have them up in fine weather.

Q. Were they down; was there any glass between you and the outside? A. I don't believe there was.

Q. Was there any obstacle intervening between you and the *Packer*? A. Not that I remember of. 195

Q. The day was a still one? A. Yes, sir; clear.

Q. How do you explain the fact, that situated as the vessels were, the *Wolverton* didn't strike this barge of ours? A. The captain can tell you more about that because he had control over her.

Q. When your captain ported his wheel did he put it hard a-port? A. I don't know.

Q. What was done at the time these two whistles were blown? A. I don't know anything at all about what the captain done.

Q. And you explain the fact of the *Atlanta* striking our barge by the statement that she was on this

196 hawser; is that it? A. Yes, sir; she was astern of us on a hawser.

Q. And that is the reason she struck our barge? A. Yes, sir; or that is the reason the barge struck the *Atlanta*.

CHARLES F. ADAMS, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Benedict:

Q. What is your business? A. Engineering.

Q. How long have you been an engineer? A. Nine years.

197 Q. Were you engineer of the *Wolverton* at the time of this collision? A. Yes, sir.

Q. You were in charge of the engine? A. Yes, sir.

Q. What was the first you saw of the *Packer*? A. The first I saw she was coming around the Battery.

Q. How did she bear with reference to your boat? A. She was on our port bow, as far as I could make out of it.

Q. How far off? A. When I seen her I suppose four or five hundred yards away from us.

Q. Did you hear any whistles at that time? A. I heard our captain blow one whistle.

198 Q. How long after you first saw the *Packer*? A. About three minutes, I suppose.

Q. Was that whistle answered? A. I don't know whether it was answered or not; I didn't take any notice of that.

Q. Did you get any bells to stop your engine? A. Not till the collision.

Q. From the time that you saw the *Packer*, as you say, ahead there, did you keep your eye upon her? A. No, sir.

Q. When was the next that you saw her? A. The next I saw her she was head into us—the canal-boat was.

Q. Do you remember about the time when you 199
saw the *Packer*—how was your vessel heading then?
A. Our boat?

Q. Yes; with reference to the New York shore?
A. We were going down towards the ferries there; just above the ferries we were—just above the South Ferry when I seen her.

CROSS-EXAMINED by Mr. McCarthy:

Q. How near the New York shore were you when you first saw the *Packer*? A. I suppose three or four hundred yards off, as near as I could tell.

Q. What point on the New York shore were you nearest to? A. Off along about Pier 5, Pier 2, or 200
somewheres around there; I didn't take particular notice what it was.

Q. It would be mere guesswork for you to state which it was? A. That is what I am doing.

Q. How near was the *Packer* to the New York shore when you saw her? A. I could hardly answer that either; I didn't take much notice of it.

Q. When your boat blew one whistle, was that whistle blown for the *Packer* or the Staten Island ferryboat? A. I don't know; I think it was blown for the Staten Island ferryboat; we went right close under her stern.

Q. You testified in Philadelphia? A. I did.

Q. And did you not then say you blew one whistle
for the Staten Island ferryboat? A. I don't know 201
whether I did or not.

Q. Did you not then say: "The first thing that attracted my attention was the blowing of the whistle of our boat—one whistle that was sounded to answer the whistle of the Staten Island ferryboat which was going out from the New York side; that one whistle meant we should keep to the right of it?" A. I suppose I did.

Q. Is that now your statement? A. As near as I can come to it; yes, sir.

Q. Where was the Staten Island ferryboat when

202 you saw the *Packer*? A. I didn't see the *Packer* again at all till after she was into us.

Q. Did you see the *Packer* before this one whistle was blown? A. Before this one whistle was blown, before the Staten Island ferryboat got out of the slip; that is when I saw the *Packer*.

Q. Was the Staten Island ferryboat backing out of her slip at this time? A. No, sir; she was going to Staten Island.

Q. And had straightened down the bay? A. No, sir, she wasn't straightened down the bay; she was just coming out of the slip.

Q. Stern foremost? A. I don't know whether stern foremost or bow; they are double-enders.

203 Q. Was this a double-ender? A. Yes, sir.

Q. How much of her got out of the slip? A. Before the whistle was blown?

Q. When the whistle was blown she was not completely out of the slip, was she? A. No, sir; she was not completely out.

Q. How much of her was out? A. I don't know that.

Q. How far away was she from your boat when this whistle was blown to her? A. I don't know that either; I wasn't looking out when the whistle was blown; I looked out after the whistle was blown.

Q. How long after? A. Right away after.

Q. Then how far was she away? A. We were
204 pretty near, going to the right of her then; very near under the stern of her then.

Q. How far from her were you? A. I suppose about twenty yards.

Q. How fast were you going? A. About four or five miles an hour.

Q. Through the water or by the land? A. I don't know how through the water; by the land.

Q. You think the Staten Island ferryboat was only twenty yards from you when you blew? A. When I looked out and saw her I suppose about twenty yards; she was just going out.

Q. How far was she when you went by her? A.

About twenty yards I said, from the Staten Island ferryboat. 205

Q. How was the Staten Island ferryboat bearing towards the *Packer?* A. I don't know about that.

By the Court:

Q. You didn't notice the *Packer* at the time, did you? A. No, sir.

By Mr. McCarthy:

Q. You had seen her just before that time? A. I had seen her some time before that.

Q. Was the Staten Island ferryboat going inside of the *Packer* or outside of the *Packer?* A. She went right across her bows. 206

Q. She went between the *Packer* and Governor's Island, didn't she? A. Yes, sir; of course she had to do that.

Q. She went between the *Packer* and Governor's Island? A. Certainly, she had to do that.

Q. Did you observe how far she passed on the starboard side of the *Packer?* A. No, sir; I didn't see the *Packer* till the collision occurred; I saw her some time before.

Q. How long was it after you passed the Staten Island ferryboat's stern that you heard the whistles of the *Packer?* A. I don't know; I didn't pay no particular attention to the whistles of the *Packer;* I didn't pay no particular attention to nothing. 207

Q. Did you observe that the barge *Atlanta* took a sheer? A. No, sir.

Q. She didn't take a sheer? A. I didn't observe nothing about it, because the next thing I knew was two bells; then I opened, threw the door open, and saw the collision.

Q. Didn't you say in Philadelphia when you testified there that the next thing you saw was "our barge taking a sheer?" A. I did.

Q. What do you mean by that? A. That was after the boat struck her then.

208 Q. The boat had struck before she took the sheer? A. After; when I looked out she had struck her, and then the barge was sheering off.

Q. But you said in Philadelphia, did you not, "The next thing I saw was our barge taking a sheer; I was in the engine room looking out of the starboard door when I saw our barge taking a sheer; she sheered to port; I then went from the starboard side to the port side of the engine-room to see where the barge was going, and I saw our barge and the *Packer* barge come together in collision"? A. If it is there, I did.

Q. And again: "I had not been to the port side of the engine-room door a minute before I saw the col-
209 lision"? A. No.

Q. You didn't say that? A. I wasn't there at all.

Q. How long was it, according to your judgment, between the time when the two whistles were blown from the *Packer* and the time of the collision? A. The two whistles of the *Packer?* I don't know.

By the Court:

Q. Did you notice any two whistles from the *Packer?* A. No, sir.

By Mr. McCarthy:

Q. Didn't you hear two whistles blown by the *Packer?* A. I heard the *Packer's* whistles; at least
210 I didn't know it was the *Packer* then, but I didn't pay no particular attention about it, because I was sitting in the engine-room then.

Q. Did you say when you testified before: "It was five minutes between the time the *Packer* blew her two whistles and the collision?" A. I don't know now whether I did or not; it is some time ago.

Q. I will read from the testimony: "The *Packer* and her barge was on the port side of us; I heard no answer to the two whistles that I heard when in the engine-room; I don't suppose it was over five

minutes or not quite so long from the time I heard these two whistles that the collision occurred;" do you now remember that you so testified? A. Yes, sir; I remember now. 211

WALTER L. SCHULTZ, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. Benedict:

Q. What is your business? A. Steamboat pilot.

Q. How long have you been a steamboat pilot? A. About thirty years—somewheres in that neighborhood.

Q. You were pilot of the *Wolverton* at the time of this collision? A. Yes, sir. 212

Q. Were you in the pilot-house in charge? A. Yes, sir.

Q. How did you head across the river after you left Roberts' Stores—after you took the barge in tow? A. Partially across the river, heading out the river and a little across it—a very little.

Q. Do you remember whereabouts you were when you first saw the *Packer?* A. Off Pier 2, East River; in that neighborhood.

Q. How far out? A. I suppose two or three hundred—about three or four hundred feet from the dock.

Q. When you saw the *Packer* how did she bear from you? A. Bore ahead of our port bow.

Q. How far off? A. I should think three or four hundred yards. 213

Q. Did you hear at any time any whistles from her? A. Yes, sir; before the collision she blowed two whistles.

Q. How far away was she at the time when she blew the two whistles? A. She was right on top of us.

Q. How far away, in your judgment? A. About one hundred and fifty feet, probably.

Q. Had you seen any change in her course? A. Not until she blowed her whistles.

214 Q. Then did you? A. Yes, sir.

Q. What change did she make? A. Starboarded her wheel, and tried to get across my bow.

Q. What did you do? A. I put my wheel a port.

Q. Did you give them any whistle? A. No; I hadn't time for a whistle.

Q. How much of a change in the course of the *Packer* did she make on the starboard wheel? A. Four or five points.

Q. How much of a change did your port wheel make on your boat? A. About the same.

Q. Up to the time when you saw the *Packer* how had the barge been following? A. Followed right after us.

215 Q. Did you notice what the barge did at the time when you put the wheel a-port? A. I looked back at the barge and he ported his wheel at the same time.

Q. Did he get any sheer on her either way? A. Yes, sir.

Q. Which way? A. Had a rank sheer at the port wheel.

Q. Did you notice how the vessel struck? A. The coal barge struck her, I should think, about twenty feet from her bow on the port side—in that neighborhood.

Q. How was the barge heading at that time, with reference to the shore? A. Heading about for
216 Hamilton Avenue Ferry slip—I should think very near that.

Q. How were the *Packer* and her tow heading? A. They were heading about Pier 2, East River.

Q. Did you hear any bells on the *Packer*? A. I heard four bells rung on her.

Q. How far away was she when you heard them? A. Very near alongside of us—abreast of us.

Q. Would there have been any difficulty in the *Packer's* escaping clear if she had put her wheel a-port? A. If she had kept her course she would have went clear.

Q. Suppose she ported her wheel? A. She would have gone to Brooklyn, for all I know. 217

Q. Then there would have been no difficulty in the *Packer's* escaping clear if she put her wheel a-port?

Objected to as leading, and as having been already answered.

CROSS-EXAMINED by Mr. McCarthy:

Q. How long had you been pilot on this *Wolverton* before the collision? A. I couldn't say; only three or four days—two or three days.

Q. How long did you remain pilot on her after the collision? A. The next morning, I believe, after the collision. 218

Q. And she left this port next day? A. Yes, sir; I was there temporarily, while my boat was getting finished.

Q. Where did you take her? A. Up to Pier 10, East River.

Q. At what time? A. In the forenoon of the next day, I think it was, I won't be certain.

Q. To whom did you deliver her? A. To Mr. White.

Q. What is your occupation now? A. Pilot.

Q. On what boat? A. On Mr. Starin's line—on the tug boat *Titan*.

Q. How long have you been on her? A. I went aboard of her last Monday week. 219

Q. What boat were you on before that? A. I was on the *Gen. Newcombe*.

Q. How long were you on her? A. About a year.

Q. Who owned her? A. She was owned by Mr. Knowles and Mr. Healy.

Q. What boat did you go in immediately after the collision? A. Went back on the *Gracie*.

Q. How many boats have you been pilot of since the collision? A. Two; I am on the third boat now.

Q. You are perfectly familiar, are you not, with the navigation of the Bay around the Battery? A. Supposed to be; yes, sir.

220 Q. What was the state of the tide at the time of this collision? A. About half ebb.

Q. Was that a strong or weak tide? A. About the strength of it.

Q. In the middle of the river that would be how many knots an hour? A. Four or five knots, four I suppose.

Q. How fast do you think your boat was going until the time of the collision—past the land or through the water? A. She was going by the land about five or six miles an hour.

Q. Not any more? A. I should hardly think so.

Q. You say the tide was running five knots an hour? A. About four or five.

221 Q. How fast were you going through the water? A. Not very fast—streerage way on her.

Q. Weren't you going two or three knots an hour through the water? A. Hardly, I should think.

Q. You gave testimony in Philadelphia, didn't you? A. Yes, sir.

Q. Didn't you then say you were going seven miles an hour? A. I may have said so; I don't know what I did say.

Q. That is a reasonable statement, isn't it? A. I suppose it is as near as we can get at it.

Q. If you want to diminish it any, do so. The *Packer* was running against this tide, wasn't she? A. Yes, sir.

222 Q. When you first saw her you observed she had a tow on her port side? A. Yes, sir.

Q. Did you also observe that this tow extended some distance ahead of her bow? A. Yes, sir.

Q. Did you also observe that this tow was loaded down pretty well? A. I suppose I saw that; I don't recollect now; I suppose I saw all those things.

Q. You know what the hauling capacity of the *Packer* is, don't you? A. Yes, sir.

Q. Now, if I may assume for the present—as I shall prove directiy—that this barge had 450 tons of coal on her, wasn't that a pretty good load—a pretty

stiff load for the *Packer* against that tide? A. No, sir; it was not. 223

Q. How fast do you think the *Packer* was going by the land? A. I don't know; I should think about four miles.

Q. Do you make that answer seriously? A. I should think so; I have no idea how much steam she was carrying; she might have been shut close off and not more than half.

Q. This is merely an expression of your opinion, that is all? A. Yes, sir.

Q. Did you have a lookout on your boat stationed forward, or were you yourself lookout as well as pilot? A. I am supposed to be lookout and pilot both; we never have lookouts on tug boats. 224

Q. That was the case then? A. Yes, sir; unless in a case of a fog, then we have a lookout, or if it is dark.

Q. How far away do you think the *Packer* was when you first saw her? A. I don't know; I think, probably, about six or seven hundred yards, I should judge.

Q. When you testified in Philadelphia you said a quarter of a mile, didn't you? A. Yes, sir.

Q. And you now say six or seven hundred yards? A. In that neighborhood; I wouldn't be certain as to distance now; but I should think it was about that.

Q. She was then on your port bow? A. Yes, sir. 225

Q. Whereabouts in the river was the *Wolverton* when you first saw the *Packer?* A. I was between Piers 2 and 3, East River.

Q. On the New York side? A. Yes, sir.

Q. What, the New York side? A. Yes, sir; off New York; off Pier 2 or 3.

Q. How far off? A. I should judge three or four or five hundred feet.

Q. No more? A. About five huudred feet.

Q. From Piers 2 or 3? A. Yes, sir.

Q. And you then saw the *Packer* some seven hundred yards off; is that it? A. Yes, sir.

226 Q. And what were you then heading for? A. I was making a turn for the Battery, going down gradually across the tide; probably heading for the Central Railroad, New Jersey—that is about where we were heading.

By the Court:

Q. Where do you say you were at the time? A. About five hundred feet off Pier 2 or 3, in that neighborhood.

By Mr. McCarthy:

Q. You think about five hundred feet? A. Yes, sir.

Q. Did you then observe when you saw the
227 *Packer* what her course was? A. Yes, sir.

Q. What was it? A. She was headed directly in the river—straight up the river.

Q. Therefore you and she were not approaching each other, head on, before the collision? A. No, sir.

By the Court:

Q. By heading up the river you mean the East River? A. Yes, sir; heading up in the East River.

By Mr. McCarthy:

Q. Where was she when you first saw her? A.
228 She was off the Barge Office—in that direction—off to the southward.

Q. How far from the Barge Office was she? A. Quite a distance; I can't tell the exact distance now, about one third of the way across from the Barge Office to Governor's Island.

Q. About how many hundred feet? A. I could not tell you.

Q. Was she nearer the middle of the stream than you were? A. Yes, sir.

Q. She was right then in the very strength of the tide? A. No, sir; she was not.

Q. Why not? A. Because she was near the edge 229
of the eddy.

Q. Do you say the eddy extended one third of the way out? A. I do most certainly.

Q. Didn't you testify before in the Philadelphia case that the eddy did not extend out more than a hundred feet or so? A. Yes, sir.

Q. Do you wish to correct that statement now? A. That depends on the tide, on the condition of the tide at the time; that eddy will extend down to within a hundred feet of Castle William in the mouth of the East River, sometimes on the last of the ebb tide; the North River tide will set the East River tide to the southward on to Governor's Island.

Q. You have already said this was about half ebb? 230
A. About half ebb.

Q. Didn't you say, speaking with reference to that, that this eddy extended about a hundred feet off? A. Off South Ferry it will; the farther you go to the westward the wider the eddy is.

Q. You ported your wheel, you say, so that the boat sheered four or five points? A. Yes, sir.

Q. Sheered in towards the New York piers? A. Yes, sir.

Q. When did you do that? A. Immediately after her blowing her two whistles.

Q. And not until then? A. Not until then.

Q. But you did when she blew the two whistles? A. I did when she blowed the two whistles. 231

Q. Are you able to say positively she starboarded her wheel at the time she blew the two whistles? A. Yes, sir, I am.

Q. You are positive? A. I am positive of that; yes, sir.

Q. Then in your judgment she starboarded at the same time you ported? A. Yes, sir; that is what caused me to port my wheel.

Q. Because she starboarded? A. Yes, sir.

Q. You hoped by porting your wheel that you could haul your barge across her bows and get inside?

232 A. No, sir; I did that to save my own boat from being sunk.

Q. If you hadn't ported your wheel you are of the opinion that your boat would have been struck? A. She would have cut my boat in two.

Q. Suppose you had starboarded instead of porting? A. There would have been a collision; she was too close on top of us; when she blowed her whistles she commenced sheering.

Q. Did you observe how many men were in her pilot-house? A. I think there were two; I won't be certain about that.

Q. You say that you were heading for Pier 2; do I so understand you? A. No, sir.

233 Q. When you were within three or four hundred feet of Pier 2 I want to know again how you were heading? A. That depends on certain stages of the transaction.

Q. Let us go back to the beginning; you hauled this boat out of Roberts' Stores? A. Yes, sir.

Q. After you got her out from Roberts' Stores you let go to take a new hold? A. Yes, sir.

Q. Did she or did she not sag down towards the Wall Street Ferry slip? A. Probably a length of the barge; yes, sir.

Q. That would be how many feet? A. I suppose that barge is about a hundred feet long.

Q. Then you got hold of her bow? A. Yes, sir.

234 Q. And straightened out on your hawser? A. Yes, sir.

Q. Now give me to the best of your knowledge—and answer it in your own way, so that you will be satisfied—what course you held after straightening out on that hawser? A. I straightened up on that hawser along the Brooklyn shore and the barge went down by me, and I turned around and came out to the East River, a little porting on New York, and heading for just below Communipaw dock—a straight line from Roberts' Stores, clearing the Battery four or five hundred feet.

Q. As soon as you straightened on the hawser

you headed for Communipaw dock? A. No, sir; I did not say so. 235

Q. Well, I will go back and ask you the question again; after making fast the second time to the barge and straightening on your hawser, what course did you take? A. I had to take a turn half way around until I got on my course, then I straightened up.

Q. In other words, did you port or starboard your wheel? A. Starboarded my wheel; we were directly along the Brooklyn docks when I straightened up and tautened my hawser, heading about northeast; I had to go up along the docks and turn around with a starboard wheel to get out in the East River. 236

Q. Why? A. The position the barge was in when I took the hawser.

Q. Tell us what the position was? A. I was heading up the the Brooklyn docks and the ebb tide carried her stern down towards the Wall Street Ferry and I let go and had to take hold again.

Q. How were you heading? A. The same way she was up the East River.

Q. After this making fast to her did you haul her up the river? A. She went up in the eddy tide some ways before we got her straightened down, probably as far as Harbeck's Stores; we were both abreast of Harbeck's Stores when I got straightened up; they are two or three piers above Roberts' Stores; we went up in the eddy tide. 237

Q. What was it caused her to sag down towards Wall Street Ferry? A. The force I gave him pulling him out; I let go and slipped along by and got the hawser on the other end.

Q. Then you got up as far as Harbeck's Stores before you straightened on the hawser? A. Very near that; I was abreast of Harbeck's Stores before I got her swung on the hawser.

Q. What was your course then? A. Course was then four, five or six hundred feet off Pier 1; just below Communipaw dock would be in a direct line

238 from where we straightened out on the barge and where the collision occurred.

Q. That is, you could take a straight course after you straightened on your hawser and make right for Communipaw Ferry? A. A little below the ferry on the Jersey shore.

Q. And clear the Battery by how many feet? A. Four or five hundred feet.

Q. How did that bring you as regards the tide—quartering on the tide? A. Slightly; the ebb tide was carrying us down a little bit; about across the river—we came with the tide and across it partially, not much.

Q. What effect would the tide have on you, if any?
239 A. It would held us along, that is all.

Q. Would it sweep you down any? A. Down the river; yes, sir; it wouldn't carry us to leeward but very little; I was going through the water all the while.

Q. What do you mean by "to leeward"? A. Sag us off with the tide, but very little—not much.

Q. Then was your course down the middle of the river at any time, or across? A. Across and down, on an angle; the tide was running straight here (illustrating) and we were bound in that course with the tide and a little angling across.

Q. What course do you think you were holding by compass in order to reach this point, a little be-
240 low Communipaw Ferry? A. I suppose heading about west-northwest, about that I should think.

Q. How does it happen that you got within three or four or five hundred feet of Pier 2, if the course you were holding would have cleared the Battery by four or five hundred feet? A. I don't understand the question.

Q. How does it happen that you got so near Pier 2 as you have described, provided the course you were holding would carry you four or five hundred feet clear of the Battery? A. If I said clear of the Battery I made a mistake; I didn't mean the Bat-

tery; it would carry us farther off from the Battery than that. 241

Q. How far off from the Battery? A. Six hundred feet off the Battery; the Battery doesn't begin till we get off Pier 1 and then it takes a short curve.

Q. Let us locate the new Barge Office; how far would you have cleared the new Barge Office on that course? A. We would go a hundred and seventy-five feet farther off, we would be one hundred and seventy-five feet farther off from the Barge Office than from Pier 8; the Barge Office Pier is a shorter pier than Pier 1, a good deal shorter.

Q. Where do you say Pier 1 is, how far from the Barge Office? A. It is to the eastward of the Barge 242
Office; it separates Staten Island north shore and Staten Island east shore ferries.

Q. How far from the Barge Office is it? A. Staten Island Ferry slip and Governor's Island Ferry slip is between that and the new Barge Office, which stands where the old Barge Office used to stand.

Q. How far is Pier 1 from the new Barge Office? A. I don't suppose over one hundred and fifty feet.

Q. Is it as much as that? A. I don't know, I never paid any particular attention.

Q. How far do you call Pier 2 from Pier 1? A. There is three ferry slips there; I don't know how far. 243

Q. How was your wheel from and after the time you straightened up on your hawser till the time you made the sheer; were you on the port wheel or starboard wheel? A. That depends on which way the boat sheered, either starboard or port. I kept a steady wheel—didn't need any particular steering.

Q. Didn't you endeavor to keep up stream a little to counteract the effect of the tide? A. No, sir; the tide wasn't sending us out enough for that.

Q. You made or intended to make a straight course from Roberts' Stores, or near there, to the point a little below Communipaw Ferry? A. Pro-

244 vided nothing got in the way or we run over nothing.

Q. And that course would have brought you how far to the southward of the new Barge Office if you had been uninterrupted? A. Four or five hundred feet.

Q. To the southward of the new Barge Office? A. To the southward of the new Barge Office; six or seven hundred feet; about six hundred feet probably, I wouldn't be sure about it.

Q. I ask you this question now, for I have a difficulty about it; if that course would have taken you six hundred feet from the new Barge Office how does it happen you got no nearer Pier 2 than six or
245 seven hundred feet?

Mr. Benedict: This is the same question which counsel has asked once before, and not only asked that directly but he has asked the difference of distance between the Barge Office and the point that he would pass, and Pier 2 and the point that he would pass.

Question allowed.

Q. Explain it in your own way. A. The Barge Office dock doesn't come out in a line with Pier 2 by probably one hundred and fifty feet; it is further to the northward than the end of Pier 2 East River is; it is on the turn of the Battery, Pier 2 stands out bold here (illustrating) and you make a circle here
246 and it would carry you further off.

Q. You have no other explanation than that to give? A. I don't see how I can give any.

Q. How far is the end of Pier 2 from the end of the Barge Office? A. I couldn't tell you.

Q. Give us your judgment? A. I don't know.

Q. You say Pier 1 may be one hundred or one hundred and fifty feet from it; how far is Pier 2? A. I don't know.

Q. Can you give any estimate? A. No, sir; I never measured it.

Q. When your tug was four or five hundred feet

from Pier 2 how far was the barge *Atlanta* from Pier 2? A. She was the same distance or about the same distance. 247

Q. What—from Pier 2? A. She was following me—right behind me.

Q. How then could she have been the same distance? A. Because when we were down at Pier 2, that line of the docks is alike at Pier 2.

By the Court:

Q. How far was the *Atlanta* from the same pier at the same moment you were there? A. The length of the hawser, whatever that was.

By Mr. McCarthy: 248

Q. The length of the hawser and her own length, if you speak of her stern? A. She was following us directly.

Q. And her bow was the length of the hawser from Pier 2 when you were at Pier 2? A. She was abreast of Pier 3; probably when we were abreast of Pier 2; she was astern of us, following directly after us.

Q. Do you mean to say the *Atlanta* ever got as far up as to be abreast of Pier 3? A. Wasn't she towing behind us; and we went down by Pier 3.

Q. How was that possible if you were heading for Communipaw Ferry? A. It is all plain enough; I think it is plausible enough. We were coming out 249
the East River, and here is Pier 2, Piers 3, 4, and 5, (illustrating).

Q. Did you come down past Pier 5? A. Yes, sir.

Q. So that your course was parallel to the New York shore? A. Not quite parallel; we were heading a little across the river.

Q. Were you at any time abreast of Pier 5? A. We passed Pier 5, certainly.

Q. Were you ever abreast of Pier 5? A. Yes, sir.

Q. And was the *Atlanta* abreast of Pier 5? A. Yes, she must have been.

250 Q. Never mind what she must have been; was she? A. Yes, sir.

Q. Were you abreast of Pier 6; did you get up as far as that?

Objected to. Question allowed.

A. Yes, sir.

Q. And did the *Atlanta?* A. Yes, sir.

Q. Got abreast of it? A. Yes, sir.

Q. And followed directly behind you? A. Yes, sir.

Q. Then you must have been coming straight down the river at that time? A. No, sir.

Q. How near to Pier 6 did you come when you
251 were abreast of it? A. I don't know how far; I suppose we were in the middle of the river when we came by Pier 6.

Q. When you first saw the *Packer* a quarter of a mile away from you, she was about opposite the new Barge Office? A. I should think so; as near as I can recollect now; yes, sir.

Q. And when you came into collision she was where? A. Off South Ferry slip, abreast of 1 or 2 there.

Q. How far off South Ferry slip do you suppose the collision occurred? A. I couldn't say exactly; two hundred feet I suppose off the end of the pier.

Q. Off the South Ferry Pier? A. Near that; I
252 can't judge distances so close.

Q. Did you at the time you ported your wheel and went across her bows think you— A. I never crossed her bows.

Q. (Continuing)—could get the barge *Atlanta* across also? A. I didn't cross her bows at all; she wasn't on our starboard bow at all at any time; I couldn't cross her bow unless she had been on our starboard bow.

Q. You went past her, did you not? A. Yes, sir.

Q. How near did you go to her? A. I suppose she was fifteen—ten or fifteen feet away when she

went by me, maybe twenty feet; we passed one an- 253
other.

Q. Did you then expect the barge *Atlanta* would get clear? A. I didn't think she would; I knew there would be a collision.

Q. You didn't slacken your speed? A. Not a particle; not till after the blow was struck.

Q. Did you observe whether the *Packer* had stopped her speed? A. She stopped her engine.

Q. Was she going through the water? A. She was.

Q. How fast? A. I couldn't tell how fast, but she was going ahead.

Q. Was she making any speed by the land? A. Yes, sir; she was—she was making some. 254

Q. Up till the time when you ported your wheel, was the *Atlanta* following directly in your wake? A. She was; yes, sir.

Q. How did it happen—on your explanation—that the *Atlanta* struck, although you went clear? A. When I give a rank sheer—I ported my wheel and threw her bows off, although I saw him heaving his wheel aport at the same time; the *Packer* was heading in for Pier 1 and the barge couldn't escape; I escaped because I was so much quicker with my boat than the heavy *Atlanta;* the *Atlanta* couldn't swing out of the way and I could.

Q. You say that she was no more than one hundred and fifty feet off when you thus ported your 255
wheel? A. Off from where?

Q. From you? A. She was more than that, I think—between a hundred and fifty and two hundred feet; a few feet I couldn't tell; I wouldn't judge that.

Q. You say you ported simultaneously with her starboarding? A. As soon as I heard his whistle blown, I don't know whether he had before that or not.

Q. And you might have been two hundred feet away? A. Yes, sir.

Q. Do you say if you had starboarded instead of

256 porting you could not have gone clear? A. I could not—going down the ebb tide so fast with the tide; I could not; I could have cleared him, but the barge could not.

Q. You say she was following in your wake? A. Yes, sir.

Q. And only yawed from you because of your porting? A. That is all.

Q. Then why, if you had starboarded, wouldn't the barge have followed? A. The barge was going down with the tide.

Q. She would have gone as well as you, wouldn't she? A. No, sir; I had just time to clear the *Packer* to save myself; I couldn't save the barge.

257 Q. Then nothing saved you but porting? A. That is all.

By the Court:

Q. Could you have escaped the *Packer* yourself by starboarding? A. I hardly think I could; I might; but at the time I done the best thing that I could.

Q. What is your judgment on that point—whether by starboarding, you could have cleared or not? A. It would have been dangerous; we might have done it, but it would have been dangerous; to port was the only way to save my boat.

By Mr. McCarthy:

258 Q. Take the case of the *Packer*, assume that she had a barge on her port side, loaded with four hundred and fifty tons of coal, which would it have been easier for her to do—starboard or port? A. Port her wheel.

Q. Port—with that heavy barge on her port side? A. Yes, sir; with that heavy barge on her port side.

Q. It would have been easier to have gone to the right instead of the left? A. Yes, sir; a great deal easier.

Q. Let me put this question to you; is it not true

that when a tugboat is running against the tide with a barge on her port side loaded with four hundred and fifty tons of coal, say, or any other merchandise, that the mere weight of the barge itself will swing that tug to port, unless she keeps her wheel to port? A. Yes, sir; we could look at that in that way. 259

Q. That is so, is it not? A. No, sir, it is not; in a way it is, and it is not.

Q. Explain yourself? A. If that boat wasn't heavy enough to tow that barge and couldn't handle her and she ought not to take hold to tow her at all; but she could handle that barge at any time and at all times; I have seen her take four and five barges up the East River—that same boat. 260

Q. I asked you whether the mere momentum, the mere *vis inertia*, the mere weight of the barge loaded with four hundred and fifty tons of coal wouldn't swing the tug to port unless the tug kept her wheel to port? A. I can't answer that only in one way; if the tug wasn't heavy enough to handle it——

By the Court:

Q. Suppose the tug had let her helm be right amidships—neither starboard nor port—in the position she was against that tide and as she was going would or would not, the effect of that barge loaded as she was be to throw her either one side or the other, and if so, which side? A. Yes, sir, it would; it would throw her to port; the weight of the barge would throw her to port. 261

Q. The barge on the port side would tend to throw the course to port, if the helm was amidships? A. Yes, sir.

Mr. McCarthy: The witness has said to the contrary.

The Witness: If I said so I wish to correct it.

By Mr. McCarthy:

Q. Then you don't mean to say she could have gone to the right easier than the left? A. No.

262 By the Court:

Q. She would have gone to the left with less steering? A. Yes, sir.

By Mr. McCarthy:

Q. With the tide running four and a half knots an hour, wouldn't it have been difficult for that tug, powerful as she was, to have taken that tow out in the middle of the river and gave gone around your barge, the *Atlanta?* A. It would not.

Q. Suppose she had thrown her engine wide open while in the middle of the river or bay, or whatever it is—suppose she had thrown her engine wide open,
263 how fast with that barge could she have gone against the tide—four and a half knots an hour? A. I can't tell you that; I never was on her; I don't know how much steam they carry.

Q. She is a twenty-two inch cylinder? A. I don't know; I never was on her and I don't know anything about it.

Q. You can't approximate to an answer? A. No, sir; I couldn't tell what any other boat would do.

Q. When you first saw her, you say you saw that her course was up the river? A. Yes, sir.

Q. And you observed that she had a deeply-laden boat on her portside? A. Yes.

264 Q. (Handing witness a paper.) Please mark on this paper the position of the Communipaw Ferry, the point for which you were heading; the *Packer* when you first saw her, and also the *Wolverton* and the *Atlanta?* A. (The witness does as he is requested.)

The diagram is marked No. 3, Schultz.

Q. Did you know from the way which the *Packer* was heading whether or not she was going up the East River or going to cross the East River when you first saw her? A. When I first saw her I suppose she was going up the East River; she was on a direct course.

Q. What led you to think that—from the way she was heading? A. Yes, sir. 265

Q. If you had kept on—assuming you were making for this point below Communipaw Ferry—if you had kept that course straight, and assuming also that the *Packer*, when you first saw her, was heading up towards or into the East River, how is it possible that you didn't have the *Packer* on your starboard side?

Mr. Benedict: I object; there isn't any allegation in the answer in this case, or in the testimony of any of the witnesses who have been examined in the other case, that the *Packer* was ever on the starboard side of the *Wolverton;* on the contrary, it has been in every respect entirely agreeing with our testimony that the *Packer* was on the port side of the *Wolverton.* 266

Question allowed.

A. The *Packer* was on our port side, and could not be in the direction she was coming any other way; she was outside of us, on our port bow, coming in the East River, from Bedloe's Island directly up the East River, the course she was on; where she came from before I saw her, I don't know, but when I saw her she headed up, directly up the East River from Bedloe's Island; if she had been several hundred feet off we would have been on top of Governor's Island, the way you have it. 267

Q. Now, again: Was there anything on your port side—any obstacles, any vessels, anything in the way to have prevented you starboarding your wheel when you first saw the *Packer*, and going off on her starboard side? A. Yes, sir; the *Packer* was there.

Q. Was there anything else? A. No, sir.

Q. The way was clear between the *Packer* and Governor's Island? A. Yes, sir; but I couldn't get there.

Q. Why didn't you see the *Packer* before? A. I saw the *Packer* as soon as I had any business to

268 see her—as soon as I could see her; that is all the answer I can give you; we have got to look out for everything; I saw her coming; she was not in my way, or I in hers.

Q. Why didn't you see her before—because you were not looking, you didn't see her when she rounded the Battery? A. No, sir; I don't think she rounded the Battery; I think she came down the North River and up the East River; if she had been on a straight course I would have seen her before I did; I would have taken notice of that.

By the Court:

Q. By rounding the Battery you mean hugging
269 the Battery? A. Yes, sir; hugging the Battery.

By Mr. McCarthy: Suppose you had seen her the moment she emerged from the west—say from a point to the west of Castle Garden—you had seen her hugging the Battery and rounding it, what would you have done? A. That would depend on circumstances.

Q. Take that circumstance and have all the rest just as they were? A. I didn't see her there at all.

Q. Suppose you had? A. I didn't see her; I couldn't tell.

Q. How far do you call it from Roberts' Stores to the new Barge Office at the end of the Battery? A. I couldn't tell; probably half or three quarters of a mile.

270 Q. How long would it have taken you to have gone over that distance as rapidly as you were then going? A. I don't know; I couldn't tell.

Q. Did you hear the jingle bell on the *Packer*? A. No, sir.

Q. You were asked when you gave testimony before, the following question: "Q. State what course you took from the time you started on your course from Roberts' Stores until the collision occurred?" Did you answer that question as follows: "A. Well, our course was about W. by N., but we seldom run on courses"? A. Yes, sir; I think that is pretty near right; I wouldn't be certain whether W. by N. or W. N. W.

Q. You were also asked: "Q. Did you keep your course from the time you started until the collision occurred?" and did you answer to that as follows: "A. Yes, sir; up to the moment of collision we never altered it; the tide was about half ebb —the strength of it; the wind was very light to the southward and westward—very light; it didn't amount to anything; it was a clear day"? A. I didn't answer the question in that way; if I did I had it wrong; we did alter our course by porting our wheel. 271

Q. "Q. Was the *Wolverton* at any time bearing from the *Packer* off the *Packer's* starboard side? A. At no time on the *Packer's* starboard side" (page 101)? A. That is right. 272

Q. You now say that the *Wolverton* was at no time on the *Packer's* starboard side? A. At no time.

Q. Are you as sure of that fact as you are that the *Packer* was at no time on the starboard side of the *Wotverton*? A. Yes, sir.

Q. Are you more positive of one than of the other position? A. The same thing.

Q. You were asked at Philadelphia: "Q. When you started from Roberts' Stores and took your course, did you maintain it or not? A. We did, sir." Did you say so? A. Probably I did; I didn't know of anything to make us alter our course; I don't know of anything being in the way a minute or two before the collision. 273

Q. Did you state on that examination, as follows: "At the time of the collision the *Packer* was laying perfectly still"? A. No, sir, I don't think I did; her engine was stopped.

Q. If you did state it were you incorrect? A. Yes, sir; if I said the *Packer* was lying still I was incorrect.

Q. It so appears here (reading from the testimony of the witness in Philadelphia): "Her engines were not moving"? A. That is what I said—her engines were not moving.

Q. How far above the deck of the *Wolverton* is

274 her pilot-house? A. I should think about seven foot above the main deck.

Q. What is the distance between the *Wolverton's* house and the railing—what is the width of the gangway? A. I forget now; I couldn't tell.

Q. Can two men walk abreast there? A. Just about pass one another.

Q. It would be over three feet, wouldn't it? A. I should think so; I was on her only one or two days and never aboard of her before nor since.

Q. What would be the natural effect on the bow of the *Packer* of her reversing, say just before the collision, when she was stemming the tide; would it throw her bow off towards Governor's Island? A.
275 Yes, sir.

Q. Did you testify as follows: "Q. How were the two tugs approaching each other when you first saw the *Packer*, head on or not? A. No, not head on; each bound on her proper course"? A. Yes, sir.

Q. Will you kindly state what the probable course was for each one? A. She was bound to the eastward on our port side, and we were bound to the westward of her port side.

By the Court:

Q. At the time when you first saw the *Packer* if you had each kept on the course you were then on, have you any recollection enough to give an estimate
276 how far apart you would have passed each other? A. We would have passed one another I should think about fifty or sixty feet.

Q. As your respective courses were when you first saw the *Packer*? A. Yes, sir.

By Mr. McCarthy: You mean the tugs would have passed each other at that distance? A. Yes, sir.

Q. And the same with regard to the barge *Atlanta*, provided the barge *Atlanta* was following directly in your wake? A. Yes, sir; the same thing.

Q. And abreast of the New York piers, parallel with the New York shore, is that it? A. Yes, sir.

Q. How much further out into the stream was the *Packer* than you were when you first saw her—if any? A. I suppose fifty or sixty feet to the southward of us. 277

Q. Assume that the *Wolverton* after straightening on her hawser had cut diagonally across the tide for Pier 2, with the intention to take that barge into the slip of Pier 2; could she have thus crossed the tide, that strong tide, without the barge yawing or sagging with the tide more or less? A. I shouldn't have gone that way to enter Pier 2 with the barge.

Q. Suppose you had done it? A. We couldn't do it; we couldn't cut across the tide to do it.

Q. Suppose you were cutting across the tide with the intention to make for Pier 2 with the barge, with the barge behind you, wouldn't that barge necessarily have sagged with that strong ebb tide? 278

Objected to as immaterial. Question allowed.

A. We never go in that position.

By the Court:

Q. Be good enough to answer the question put to you. If you had made straight for Pier 2 in crossing the tide, would the barge naturally have sagged down the river or not—that is to say, on your port quarter? A. Yes, sir; it would; crossing the river.

By Mr. McCarthy:

Q. How much would it have sagged out of line? 279
A. We would have went across the river and went down.

Q. Go back to the question I put to you. You admit she would have sagged down; now I ask you how much she would have sagged? A. I couldn't tell; it depends on how fast we were going and how well the barge steered.

Q. Take the speed you were going on this occasion and take this very barge? A. From Roberts' Stores to Pier 2; is that the question?

Q. You say she would have sagged; I only ask

280 you how much she would have sagged? A. She couldn't have sagged twice the width of the barge, crossing from Roberts' Stores to Pier 2.

Q. How wide was the barge? A. I think it was about forty feet, probably.

Q. Suppose you had been thus cutting across the tide diagonally with the barge thus sagging; wouldn't it have been a difficult matter for the *Packer* with this heavy tow on her port side to have got around the barge? A. No, sir.

Q. Not even then? A. No, sir; not even then.

Q. Did you answer in Philadelphia as follows: "Q. And you were heading what course? A. About west by north; just so as to clear the Battery nicely,
281 and had been on that course since I left Roberts' Stores?" A. I suppose that was the proper answer.

Q. You did so answer? A. Yes, I think I did; and that would be proper—as near right as I could judge at the time.

Q. Did you state as follows: "Q. From and after the time you left Roberts' Stores your course was about W. by N.? A. Yes, near that; the *Wolverton* went diagonally across the river, quartering on the tide?" A. Yes, sir.

Q. In what direction does the half ebb tide set opposite Roberts' Stores; does it sweep down towards Buttermilk Channel? A. Straight down until it gets abreast of South Ferry and then it strikes Gov-
282 ernor's Island.

Q. At Wall Street Ferry and Roberts' Stores its tendency is straight down? A. Yes, sir; slack water on the ebb.

Q. How far out does the slack water go on to the Brooklyn side? A. On the half ebb it sets out, maybe a hundred feet, more or less.

Q. And about the same on the New York side? A. Yes, sir; that is off South Ferry and off Pier 1, East River.

REDIRECT by Mr. Benedict:

Q. I understand you to say that your course with

the barge was crossing the river towards the New York shore and drawing nearer the New York shore all the time; is that so? A. Yes, sir. 283

Q. Was there any time when the barge was going parallel with the New York piers? A. The barge was following directly after us.

Q. That I understand. Now, answer this question: Was there any time when the barge was going parallel with the New York piers?

Objected to as having been already asked and answered on cross-examination. Question allowed.

Q. Was there any time before the collision when the barge *Atlanta* was going parallel with the line of the New York piers? A. No; the barge followed us and I gave the course; at no time did she change her course until her wheel was ported to avoid the collision. 284

Q. Up to the time when you ported your wheel had there been any time that you had been going parallel with the line of the ends of the piers? A. No, sir; no time.

Q. How had your course been bearing, on to the piers or off from them? A. From Roberts' Stores it was bearing rather on to Pier 2, just four or five hundred feet off; from Roberts' Stores we crossed the river northward and westward or to the westward and northward—partially across the river; from Wall Street Ferry we passed along by the piers all the way down, angling along. 285

Q. You understand I am speaking of the piers in the East River? A. Yes, sir.

Q. What is the fact as to whether the barge *Atlanta* was sagged down below the course of your boat by the tide; was she, or was she not? A. She was not; she followed directly after me; we were going with the tide and so little across it that the sag was not perceptible at all.

Q. I understood you to say that there would have been no difficulty in the *Packer* sheering off to her

286 starboard with the tow she had? A. She could have went off to the starboard if she had wished to.

Q. What would be the effect, the moment her engines were stopped and backed, of her having a canal-boat on her port side; which way would that swing the head of the *Packer* and tow? A. To the southward, towards Governor's Island.

Q. I understand your idea to be that these vessels were not approaching head on; how do you say they were approaching?

Objected to as having been already answered two or three times. Question allowed.

Q. When you first saw the *Packer* how were they
287 then approaching? A. The *Packer* was coming up the East River in a line, I should think, about fifty feet to the southward of us—coming straight up the East River.

Q. And at that time which of her bows was towards you, if either? A. Her port bow.

Q. What was the effect of her starboarding her wheel? A. To cross us or to come into us.

Q. What was the effect of that, as to turning one bow or the other towards you? A. Very quick.

Q. Which bow would it turn towards you? A. The starboard bow, if you turn the wheel far enough.

288 By the Court:

Q. You speak of the barge sagging; you were crossing the river direct? A. Direct across.

Q. If you were crossing the river direct and the barge was straight behind you, do you mean to say that in crossing the barge would sag down the stream more than you? A. No, sir; no more than us.

Q. You would both float down together? A. Yes, sir.

Q. Do you mean to be understood that in crossing that way directly or diagonally, that one would sag more than the other? A. No, sir.

By Mr. McCarthy:

289

Q. Although she is on a hawser a hundred feet long? A. They would both sag alike.

FREDERICK PARKER, recalled for further CROSS-EXAMINATION:

By Mr. McCarthy:

Q. Was the blow that you received above or below the water line, or both? A. Below the water line to the futtocks.

Q. How many feet was it abaft the bow? A. I should judge fifty or sixty feet from the bow. I never measured; I only supposed so.

290

Q. Was it amidships? A. Not quite.

Q. Was it forward of amidships? A. Forward of amidships; yes, sir.

Q. How wide is your barge? A. Thirty-eight feet by the Government measurement.

Q. And how long is it? A. 138 feet by the Government papers—by the Custom House papers.

Q. Did she take water immediately? A. Yes, sir. She was sinking when the canal-boat hauled her out. One of the deckhands of the *Packer* told me he would run her ashore, and she was sinking when I got on the boat's deck.

By Mr. Benedict:

291

Q. How wide are the guards? A. About three feet. I measured them yesterday, from the hull to the outside part of the guards.

Q. Whereabouts was the barge run ashore? A. This side of Castle Garden—of the landing stage of the Garden. Here is the Castle Garden dock and the bulkhead (illustrating), and the barge was this side, fore and aft on the beach.

Q. Have you looked to see since yesterday as to whether you can see from Roberts' Stores a vessel coming off Castle Garden? A. No; you cannot if she is this side. The barge was lying there, so (illus-

292 trating), and you cannot see till she is this side of South Ferry.

WILLIAM ACKERLEY, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Benedict:

Q. What is your business? A. Boating.

Q. How long have you been boating? A. Fourteen years.

Q. Were you on the barge *Atlanta* at the time of this collision? A. Yes, sir.

Q. Whereabouts were you on board? A. At the wheel.

293 Q. On which side of the wheel? A. On the port side.

Q. Whereabouts did you first see the *Packer?* A. She was about in the neighborhood of 300 yards from us on the port bow.

Q. How much on your port bow? A. I should judge three or four points probably.

Q. Did you notice previous to that time how the barge had been steering with reference to the tug *Wolverton?* A. Directly after.

Q. Did you at any time see any change in the course of the *Wolverton?* A. I didn't notice any.

Q. Did you notice her swinging either way? A. No, sir.

294 Q. Do you remember anything being done with your wheel? A. Yes, sir. It was hove hard aport.

Q. How soon was that after you saw the *Packer?* A. I should judge in the neighborhood of two or three minutes.

Q. Do you remember what caused you to port your wheel? A. Yes, sir.

Q. What was it? A. On account to clear the *Packer.*

Q. Whereabouts did the canal-boat strike the barge? A. Fifty feet from the stem, I should judge.

Q. Aft of the pilot-house you were standing in? A. Yes, sir.

Q. And at the time when the two vessels struck, how was your vessel heading with reference to the shore? A. I should judge we were heading for Central Ferry of New Jersey. 295

Q. And how do you think the *Packer* and her tow were heading? A. They were heading up the East River.

Q. (Handing witness a paper.) Please illustrate on that paper how the canal-boat struck the barge; how were they heading with reference to the course of your barge at the time they struck? A. (The witness does as he is requested).

The diagram is marked No. 4, Ackerly.

Q. Did you hear any bells rung on the *Packer*? A. No, sir. 296

Q. Did you hear any whistles blown from either boat? A. No, sir.

CROSS-EXAMINED by Mr. McCarthy:

Q. Will you please tell us just whereabouts in the river the collision occurred between your barge and the Cross Creek barge? A. About, I should judge, 300 yards from off Pier 1.

Q. Where do you say Pier 1 is? A. The lower side of the ferry.

Q. What ferry? A. Hamilton Ferry.

Q. Do you put Pier 1 to the west; that is, towards Jersey, or towards Brooklyn, from Hamilton Ferry? 297
A. Towards Jersey, west.

Q. Then there is only one slip, is there, between Pier 1 and the new Barge Office? A. I am not certain whether there is one or two.

Q. It is a short distance? A. Yes, sir.

Q. You think it was about 300 yards from there? A. I should judge, yes, sir.

Q. Out into the stream? A. Yes, sir.

Q. Where then was the *Packer* when you first saw her? A. In the neighborhood of 200 yards.

Q. Away from that? A. Yes, sir.

298 Q. Further inshore or further out? A. To the southward of us.

Q. That is further out? A. Yes, sir.

Q. How was she heading? A. She was heading towards us.

Q. Not heading up into the East River? A. Somewhat; yes, sir.

Q. How far away were you from Pier 1 when you first saw the *Packer*, or what pier, in your judgment, was nearest to you when you first saw the *Packer?* A. Pier 2, I should judge.

Q. How far do you think you were from Pier 2 when you first saw the *Packer?* A. That I couldn't say exactly.

299 Q. You are not able to give any estimate? A. No, sir; only when the collision occurred.

Q. Did you hear any shouting from the *Packer* or the Cross Creek barge, just before the collision? A. No, sir.

Q. Did you hear any from the barge to the *Packer* before the collision? A. Yes, sir; the captain hollered.

Q. What did he say? A. "Sheer over," or something—I understood him—I don't know exactly.

Q. How far do you think the *Wolverton* passed from the Cross Creek barge when she went by her. A. In the neighborhood of sixty feet, I should judge.

Q. How do you explain the fact that you struck
300 the Cross Creek barge if you were following directly in the wake of the *Wolverton?* A. How do I explain it, myself?

Q. Yes. A. We were going across the tide and she was coming up the East River; naturally when we got across the canal-boat struck us and she cleared.

Q. How was the *Wolverton* able to clear fifty or sixty feet when you struck the barge? A. When the *Wolverton* passed the *Packer*, do you mean?

Q. If the *Wolverton* passed the *Packer* and her tow fifty or sixty feet away, how is it that you hit

the tow; don't you understand my question? A. 301
No, sir.

Q. How do you explain the fact that the *Atlanta* was struck by the Cross Creek Barge when the *Wolverton* passed her sixty feet away, if you were following directly in the wake of the *Wolverton?* A. We had a very short hawser.

Q. Is that all your explanation? A. Yes, sir.

Q. Is that all you can think of? A. Yes, sir.

Q. You were swinging on that hawser, weren't you? A. We were towing by it.

Q. You were swinging on it, weren't you? A. Not swinging a good deal.

Q. You were swinging some? A. Yes, sir.

302

REDIRECT by Mr. Benedict:

Q. How much? A. That I couldn't say.

Q. Did you swing ten feet to one side?

Objected to as leading. Question withdrawn.

Q. Was the *Packer* stopped before the collision—I mean her forward motion, or was she coming ahead? A. She was coming ahead.

Q. At the time of the collision? A. Yes, sir.

Q. Supposing instead of coming ahead she had been standing perfectly still and the *Wolverton* had passed her sixty feet off, how far would you have passed her? A. If she had been perfectly still?

Q. Yes. A. And we were going across her 303
bow.

Q. Yes. A. I should judge we would have cleared about forty or fifty feet.

Q. But as she was coming ahead she struck you? A. Yes, sir.

[LIBELLANTS REST.]

304

CLAIMANT'S TESTIMONY.

STEVEN SLOVER, being duly sworn and examined as a witness for the respondents, testifies:

By Mr. McCarthy:

Q. Were you the pilot on the steamtug *E. A. Packer* at the time of this collision between the Cross Creek barge and the *Atlanta*? A. Yes, sir.

Q. Where were you at the time of the collision? A. In the pilot-house.

Q. Who was with you in the pilot-house? A. Deckhand lookout.

305 Q. What was his name? A. Shields.

Q. Who else was with you in the pilot-house, if anybody? A. No one at the time.

Q. Where had you come from? A. From Pier 9, North River.

Q. What had you been doing at Pier 9? A. Been landing boats there.

Q. How many men were on your tug at that time during that day or that afternoon? A. Eight.

Q. Who were they? The captain, two deck hands, two firemen, the steward and the engineer.

Q. Was there anybody on your tug from the Cross Creek barge? A. About that time one of the men off the barge came up in the pilot-house and gave me a ticket.

306 Q. About what time? A. Just before the collision.

Q. What was his name? A. Purnell.

Q. Where had you come from that day? A. Port Johnson.

Q. With what? A. A tow of canal-boats.

Q. And this Cross Creek barge was the last one in tow. A. Yes, sir.

Q. Was she loaded? A. Yes, sir.

Q. How deeply? A. She had on four hundred and fifty odd tons of coal.

Q. She was on your port side when you left Pier 9? A. Yes, sir. 307

Q. Did her bow extend beyond yours? A. Yes, sir.

Q. How much? A. I should say about twenty feet.

Q. Was she quite low in the water? A. She was about four foot out of water.

Q. At the time of the collision, how was the tide? A. Running ebb.

Q. What else; was it early in the ebb? A. About half tide; full strength of the tide.

Q. What would be the full strength of the tide opposite the new Barge Office or Pier 1? A. Do you mean out in the stream?

Q. Yes; the full strength of the tide in the middle of the stream? A. About four and a half knots an hour is the calculation. 308

Q. How far out would the slack water or eddy extend? A. Extend out, I suppose, seventy-five feet from Pier 1.

Q. Do you mean the eddy or slack water? A. Eddy.

Q. Would the slack water go beyond that? A. Yes; I guess it would.

Q. After you left Pier 9, as you came down the North River, did you keep pretty close to the piers? A. Kept close around the Battery; yes, sir.

Q. As you rounded the Battery, how far, in your judgment, were you from, say, Castle Garden, or the bulkhead of Castle Garden? A. I suppose we were two hundred yards off, something like that. 309

Q. Is that your best judgment? A. Yes, sir.

Q. Is there a custom prevalent in this port in regard to tugs with loaded tows in charge going around the Battery against an ebb tide as to where they go? A. Yes, sir.

Q. What is it? A. All boats going around there against the tide are supposed to keep in along the shore.

Q. Which shore? A. The New York shore.

Q. As you came around the Battery, how fast do

310 you think you were going by the land? A. About two miles—two knots an hour.

Q. How was your cylinder; wide open? A. No, sir.

Q. How many inches? A. I suppose fifteen or sixteen.

Q. If you, instead of being, as you say you were, two hundred yards from the New York shore, had been in the middle of the stream, the tide running as it did, how fast could you have gone as you were rounding the Battery? A. In the middle of the East River?

Q. Out in the middle of the water there. A. We would not have gone very fast.

311 Q. How fast do you think you could have gone stemming that tide? A. We wouldn't any more than had steerage way on the boat.

Q. How fast would that have been? A. I can't say how fast; not hardly enough to control the boat—wouldn't be going ahead of any account.

Q. About what time of day was it that you were thus rounding the Battery? A. About four o'clock.

Q. Was there much, if any, wind? A. No, sir.

Q. What kind of day was it? A. It was a mild day—light air to the southward and westward.

Q. Clear, or otherwise? A. Yes, sir; pretty clear.

Q. Where were you when you first saw the tug *Wolverton?* A. Just below Pier 1.

312 Q. Where were you when you first saw the *Wolverton?* A. When we were right off the Barge Office I saw her.

Q. How far away from you was she when you saw her? A. She was near the middle of the river.

Q. How far away? A. I suppose seven hundred yards.

Q. From you? A. Yes, sir.

Q. She was on a line between you and what point in Brooklyn? A. About Wall Street Stores, I should say.

Q. How far off from the Barge Office were you? A. A couple hundred yards—two hundred yards.

Q. You say that a line drawn from you to the *Wolverton* when you first saw her would touch Brooklyn about at the Wall Street Stores? A. Somewhere in that direction. 313

Q. What was your course when you thus saw the *Wolverton;* how were you heading? A. Up the East River, or nearly so.

Q. Were you on a port or starboad wheel, or how was your wheel? A. It was a little to port—just to keep the barge steady; the barge was on our port side.

Q. What do you mean by that—a little port, just to keep the barge steady; please explain what you mean by that? A. When you have a heavy loaded barge on the port side it requires some port wheel for to keep her steady. 314

Q. What will happen if you don't let the wheel port a little? A. It is likely to go inshore with you, if you are near the shore on that side.

Q. What is that owing to? A. The tide running.

Q. Why does it take you in that way? A. The heavy barge on the port side, that is the reason.

Q. Wouldn't that be the case wholly irrespective of the tide? A. Yes; it is the case any time.

Q. What would be the effect of simply letting your wheel loose; you say you kept it a little to port, what would have been the effect of letting your wheel easy? A. The barge would run into the dock, if you let go of it. 315

Q. It wouldn't be necessary, then, to starboard your wheel? A. No, sir.

Q. On what side of the tug *Packer* was the *Wolverton* when you first saw her? A. Starboard.

Q. Can you tell how many points? A. No, sir; I cannot.

Q. Can you state from the position in which you saw the *Wolverton* on which side of her you were? A. We were to the port side of her.

Q. And which way was she heading? A. She was coming about quartering on us.

Q. Quartering on you? A. Yes, sir.

316 Q. For what point did she seem to be heading? A. She seemed to be going around the Battery; I suppose she was going that way.

Q. Was she heading for any point on the New York shore such as that she would have run into the shore had she kept straight on? A. No, sir.

Q. Suppose she had kept this very course on which you saw her going when you first saw her, how would she have passed you? A. She would have went under our stern.

Q. That means on which side? A. On our starboard quarter.

Q. How many points was she on your starboard bow? A. I couldn't say.

317 Q. How fast was she coming? A. About seven knots an hour.

Q. Did you observe her tow? A. Yes, sir.

Q. How far behind her was the tow? A. She had, I suppose, about twenty fathoms of hawser out—twenty or twenty-five.

Q. Did you observe how the tow was progressing in respect of the *Wolverton;* was she directly in the *Wolverton's* wake or did she sag? A. She was sagging; she couldn't follow the *Wolverton.*

Q. Why not? A. On account of the tide—strong ebb tide.

Q. How much did she sag? A. Twelve or fourteen feet.

318 Q. Besides her own width? A. Yes, sir.

Q. How wide did she seem to be? A. I should say she was about thirty-eight or forty feet wide.

Q. Now go on and state what you did after you saw the *Wolverton?* A. I blowed two whistles.

Q. You blew him two whistles first? A. Yes, sir.

Q. How far away from you was he then? A. About five hundred yards.

Q. When you blew the two whistles? A. Yes, sir.

Q. What next? A. I blowed him two more.

Q. How long after the first two? A. It was not a half a minute, I guess. 319

Q. How far away was he when you blew the second two? A. He came about a length ahead, I guess—the length of the barge and tug.

Q. One blast quickly followed the other? A. Yes, sir.

Q. What next? A. I stopped after I blowed the first two whistles—I stopped my boat.

Q. After you blew the first two? A. Yes, sir.

Q. How long did it take you to stop your boat, going as she then was against the tide two miles an hour? A. It did not take long; a very short time.

Q. Was it necessary for you to reverse? A. Yes, sir. 320

Q. How many revolutions before she stopped? A. I could not tell you that.

Q. Can you give us any estimate of it? A. No, sir.

Q. Is your propeller a right or left wheel? A. Her wheel turns to the right when she goes ahead.

Q. And contrariwise when she is reversing? A. Yes, sir.

Q. You got no reply from the *Wolverton?* A. No, sir.

Q. Did you see whether or not the *Wolverton* changed her course? A. Yes; she hauled up the river more after I blowed the two whistles. 321

Q. As if he had done what to his wheel? A. Ported his wheel.

Q. Hard, or otherwise? A. No; it didn't seem to be hard over.

Q. Did you see him executing that manœuvre of porting his wheel? A. Yes, sir.

Q. How far did the *Wolverton* pass from the bow of the Cross Creek barge? A. About fifteen feet.

Q. Did you observe whether there was any porting or otherwise on the *Atlanta?* A. I didn't take notice of them.

322 Q. Whereabouts was the *Atlanta* struck—hit; where did she come in contact with the Cross Creek barge? A. On her port quarter.

JAMES E. PURNELL, being duly sworn and examined as a witness for the claimant, testifies:

By Mr. McCarthy:

Q. How old are you? A. Twenty-three years old next October.

Q. You belong to the Cross Creek barge No. 4? A. No. 1.

Q. Your father was master of her? A. He was
323 master at that time of No. 5.

Q. At the time of this collision what barge were you on? A. No. 5, Cross Creek.

Q. Was that the barge in tow of the *Packer*? A. Yes, sir.

Q. Where were you at the time you left Pier 9? A. I was standing on the barge's deck till we got around to about going around the Battery at Pier 1.

Q. How near, if you observed to state, did you keep to the New York piers coming down the North River? A. About two or three hundred feet —300 feet.

Q. As you rounded the Battery how far was your tug and tow from Castle Garden, to the best of
324 your knowledge? A. She was about 500 feet off there.

Q. And how far off was she from the end of the new Barge Office? A. I don't know about how far she was off there.

Q. Give it as nearly as you can? A. About 400 feet, I suppose.

Q. Were you in the slack water? A. I believe it was a little slacker there.

Q. Did you see the *Wolverton* and her tow coming? A. Yes, sir.

Q. Where were you at that time standing? A. I was in the pilot-house of the *Packer*.

Q. When you thus saw the *Wolverton* and her tow whereabouts was the *Packer?* A. The *Packer* then was abreast of Pier 1 and rounding. 325

Q. Rounding what? A. Rounding towards into the East River.

Q. And how far was the *Packer* from the end of Pier 1, to the best of your knowledge? A. About 300 feet.

Q. How far away was the *Wolverton* when you saw her? A. I don't know about how far; I should think about 800 yards.

Q. And where was she? A. She was then heading across to the East River.

Q. Whereabouts in the river? A. She was about in the middle of the river. 326

Q. On which bow of the *Packer* was she? A. On the *Packer's* starboard bow.

Q. What part of the *Wolverton* did you see; did you see both her starboard and port bow, or did you see only one? A. I see both sides.

Q. She was heading in such a way that you saw both bows? A. Yes, sir.

Q. Are you sure of that? A. Yes, sir; I am sure.

Q. Did you see whether there was anything attached to her, or hanging on to her? A. Yes, sir; a barge.

Q. How far behind her? A. About 20 or 25 fathom of hawser out, I guess.

Q. Did you observe whether that barge was following her straight, or whether it sagged with the tide? A. She was sagging down with the tide. 327

Q. More than the *Wolverton?* A. Yes, sir.

Q. How much do you think she was sagging? A. I don't know; about twice the width of the barge or so.

Q. How much would that be; how wide did the barge seem to you to be? A. I couldn't tell at the bottom how wide it was; I guess about 30 feet or 35 feet wide the barge must have been.

Q. Did you see the *Wolverton* go by your Cross Creek barge? A. Yes, sir.

328 Q. How far away from her did she go? A. She went away from our coal barge about 30 feet.

Q. You think she was as much as that? A. That is about it.

Q. Did you see where the barge *Atlanta* was hit? A. Yes, sir.

Q. Where was it? A. Hit on the bow bilge 25 feet about from the stem.

Q. How fast do you think you were going? A. About two miles or two and a half an hour.

Q. By the land or through the water? A. By the land.

Q. Did you hear any whistles from the *Packer*? A. Yes, sir; I heard her blow two whistles.

329 Q. How far away was the *Wolverton* when those two whistles were blown? A. About eight hundred yards; that is what drawed my attention first.

Q. Did the *Wolverton* make any reply? A. No, sir.

Q. Did you see any movement on the *Wolverton* in her pilot-house after that? A. Yes, sir; I see the captain there; I thought it was; I don't know.

Q. What did you see him do? A. I see him try to get the wheel over to starboard, and then he went the other side of the house and pulled it aport and then I see no more.

Q. He pulled it aport? A. Yes, sir.

Q. Did the *Packer* sheer in some towards the New
330 York shore after her whistles were blown? A. I believe she did go a little in towards the New York shore.

Q. How fast did the *Wolverton* seem to come? A. I don't know exactly; I should think about 8 miles an hour by the land.

Q. Who else was in your pilot-house? A. Jimmy Shields was in and Stephen Slover.

Q. Who had the wheel? A. Stephen Slover.

Q. Suppose the *Wolverton* had not ported her wheel but had kept straight on after you blew your whistles, and had gone in towards the docks a little,

would she have gone by you? A. She would have 331
gone under the *Packer's* stern.

Q. Would the tow have done the same thing? A. Yes, sir.

Q. And there would have been no collision? A. I hardly think there would; I know there wouldn't.

Q. Is it your belief that her porting her wheel as she did led to the collision? A. Yes, sir.

It is agreed by counsel on both sides that any of the Inspector's rules that are applicable to this case shall be considered in evidence.

Q. Have you been at the Communipaw Ferry dock this morning? A. Yes, sir. 332

Q. State what observation you made there, if you made any? A. I didn't make much of any; I took notice of Wall Street Ferry on the Brooklyn shore.

Q. You were at the Communipaw Dock, Jersey City? A. Yes, sir.

Q. And you looked over where? A. I supposed it to be Wall Street Ferry.

Q. Was it Wall Street Ferry? A. I believe it was.

Q. You know where it was? A. Right about where I was showed yesterday by one of the men—I was sure it was—right above the elevator there; I looked from the dock, from the Lehigh Valley dock there 333
and seen there could be a straight course steered over there to that dock.

Q. To that ferry slip? A. To that ferry slip, yes, sir; and clear the Battery.

Q. By how much? A. By a couple of hundred yards anyway.

CROSS-EXAMINED by Mr. Benedict:

Q. Where had the barge come from in tow of the *Packer*? A. From Martin's Stores.

334 Q. Your barge? A. She had come from Port Johnson.

Q. How many barges made up the tow? A. Two.

Q. Besides the *Cross Creek?* A. No, there was two they fetched up from Port Johnson to New York—the *Cross Creek* and another.

Q. Didn't they have other vessels in tow coming up from Port Johnson? A. Yes, sir; No. 1 *Cross Creek* I believe it was.

Q. How many boats did she have coming up from Port Johnson? A. Only two boats, that is all.

Q. What was the size of the other barge as compared with your barge, the same size? A. No, sir;
335 she was smaller.

Q. How much smaller? A. About three hundred tons smaller.

Q. How much was the *Cross Creek?* A. The *Cross Creek* is 425, and No. 1 *Cross Creek* is only 130 or 140.

Q. Do you mean to say that you didn't bring but two boats up from Port Johnson? A. All I remember; yes, sir; all I recollect.

Q. Do you remember where the *Packer* struck the ebb tide? A. I don't know anything about the tide.

Q. Do you know how the tide was at the time of the collision? A. Yes, sir; it was running ebb
336 tide.

Q. Do you know how long it had been running ebb? A. No, sir.

Q. The *Packer* went up to Pier 9 first, didn't she? A. Yes, sir; landed one boat there.

Q. Do you remember whether she had the ebb tide against her going up there? A. I do not.

Q. Whereabouts do you say the *Packer* was when you first saw the *Wolverton?* A. Just rounding the Battery.

Q. Whereabouts was the *Packer* when you first saw the *Wolverton*, abreast of it? A. The *Packer* was off Pier 1, East River.

Q. When you first saw the *Wolverton*? A. Yes, 337
sir.

Q. Where do you say the collision was? A. The collision occurred about—I don't know where exactly the collision happened, what pier it was off of; it was right up in the East River.

Q. Do you know where the South Ferry slip is? A. There is so many ferries there I never paid much attention to them.

Q. Do you know where the Staten Island Ferry slips are? A. Yes, sir.

Q. Was the collision as far up as the Staten Island Ferry slip? A. It was farther up than that.

Q. To the east of that? A. Farther up the East River than that. 338

Q How far do you think the *Packer* ran after you saw the *Wolverton*? A. A very little distance; I couldn't tell how far.

Q. A length of her? A. Somewhere around that anyway.

Q. Not two lengths? A. No, sir; not two lengths.

Q. Have you any idea what the distance is between Pier 1 and Pier 2? A. No, sir; I do not; I might have a little idea about the distance.

Q. What is your idea as to the distance between them? A. About 125 or 130 feet.

Q. If you were abreast of Pier 1 when you saw the *Wolverton* then you think that the *Packer* after 339
that didn't run as far as Pier 2? A. No, sir.

Q. When you saw the *Wolverton* about abreast of what pier was she? A. I couldn't say that; I don't know what pier she was abreast of.

Q. Was she abreast of Pier 2? A. No, sir; she was farther up than that.

Q. Of 3, do you think? A. Yes; above 3.

Q. What did you go into the pilot-house for? A. To give tha captain a tow ticket.

Q. Where did you go into the pilot-house? A. I went right there and handed the man the ticket.

Q. How long before you saw the *Wolverton* did

340 you go into the pilot-house? A. It wasn't over half a minute.

Q. Just went in at the time you saw the *Wolverton?* A. Yes, sir.

Q. Whom did you give the ticket to? A. The captain—Stephen Slover.

Q. He was not the captain? A. No; the pilot at the time.

Q. Do you remember which side of the pilot-house you went in? A. I went in the centre of it; I believe the door is in the centre.

Q. Aft or forward? A. Aft of the pilot-house.

Q. Did he turn around to speak to you? A. No, sir.

341 Q. What did you say to him? A. I don't know as I said anything to him.

Q. Do you mean that you just went up and stuck the receipt out to him and didn't say anything? A. Yes, sir.

Q. Did he take it from you? A. I wouldn't say whether he took it from me or not; I don't remember.

Q. Did he say anything to you? A. No, sir.

Q. Whereabouts had you been before you went up into the pilot-house? A. I had been in the cabin of the barge.

Q. Was anybody there with you? A. My father and mother was there.

342 Q. And you were talking with them? A. I stayed there a little while and walked out.

Q. You were talking with them while you were there? A. I don't know whether I was or not.

Q. Do you know what else you were doing while you were there? A. No, sir.

Q. Have you any memory of looking out while you were in the cabin to see whereabouts in the river you were? A. No, sir.

Q. Do you remember abreast of what point it was that you went into the cabin of the barge? A. Just before we rounded to in the East River I went in after the tow ticket.

Q. Abreast of what point; had you got down to 343
Castle Garden when you went into the cabin? A. About Castle Garden, maybe a little this side.

Q. You went in to get the tow ticket, did you? A. Yes, sir.

Q. And when you got it you came out and went up above in the pilot-house to give it to Slover? A. Yes, sir.

Q. Did you see Slover move his wheel at all after you got in the pilot-house? A. Not at that time; no, sir.

Q. Not at all after you got into the pilot-house? A. No, sir.

Q. Did you stay in the pilot-house till the collision? A. No, sir; when I seen there was going to be a col- 344
lision I got out, long before that.

Q. Up to that time he had made no change in his wheel? A. Not while I was in there; no, sir.

Q. How soon after you got into the pilot-house were the whistles blown? A. Shortly after—I wouldn't say; it was about half a minute.

Q. Had you seen the *Wolverton* before the whistles were blown? A. No, sir.

Q. That was what called attention to her, wasn't it? A. Yes, sir.

Q. Did you hear two whistles blown more than once? A. Yes; I heard two whistles—four altogether.

Q. How long a time between the different twos? 345
A. I don't know exactly; I couldn't say.

Q. How far did the *Packer* go between the two whistles? A. She didn't go half her length.

Q. How far do you think the *Wolverton* went between the two whistles? A. I couldn't say; I don't know about that; she was coming down pretty lively.

Q. How far do you suppose she ran while the *Packer* was going half a length? A. She may have run her length and the barge.

Q. How many feet do you call that? A. Couple hundred feet.

346 Q. How far away was the *Wolverton* when the second two whistles were blown? A. About 400 yards away.

Q. Do you know how many feet 400 yards is? A. I don't know; I never figured it up.

Q. Do you know what part of a mile it is? A. No, sir.

Q. Do you mean to say that you think when the two whistles were blown the second time the *Wolverton* was a quarter of a mile away? A. Yes, sir.

Q. Did you think there was going to be a collision then? A. Yes, sir.

Q. What made you think so, if they were a quarter of a mile apart? A. I see the way they acted; I
347 kind o' thought so anyway.

Q. Did Slover ring any bells? A. Yes, sir.

Q. When did he ring bells, with reference to the whistles? A. Right after he give the two last whistles he give the bells to stop his boat, and I believe he stopped her right away; then right after, shortly after, he rang the bells to go back.

Q. Did she get stopped before the collision? A. Yes, sir.

Q. When he blew the second whistle how was the *Wolverton* bearing from the *Packer*—in what direction was she when you looked at her—which way did you look? A. The second two whistles—the second two whistles was blowed when she bore about
348 head on—the *Wolverton*.

Q. Do you mean to say you looked about over the stem of the *Packer* to see her? A. Of the *Packer?* Yes, sir.

Q. You think that at that time she was about right ahead of the *Packer* so that as you looked you looked right over the stem of the *Packer* and saw the *Wolverton?* A. Yes, sir.

Q. Did you see her looking over the stem of the *Packer* or off either side? A. I don't remember.

Q. Don't you remember whether you looked ahead or to one side to see her? A. I know I looked

towards the starboard side of the *Packer* to see her 349
—that is my right side; yes.

Q. If you looked off to the starboard side then the *Wolverton* could not have been right ahead, could she? A. She was pointing about to the *Packer*'s bow, and the barge was sagging down.

Q. I am not asking where she was pointing, but where she was? A. I don't know where she was.

Q. You don't know in what direction you had to look to see her? A. I had to look off from my right-hand side to see her.

Q. How much do you think she was at that time ahead of the stem of the *Packer;* I mean if a line from her had been carried out straight, and a line from the *Packer*'s stem had been carried out 350
straight, how far would that have put her ahead of the *Packer;* can you tell that?

Objected to.

Q. What I want to know is: When you looked off how far the *Wolverton* was ahead of you in the line the *Packer* was going—how far would the *Packer* have had to go in order to reach the point abreast of the *Wolverton?* A. How far would she have had to go? She couldn't go nowheres.

Q. You say that you saw somebody in the wheel-house of the *Wolverton* pulling the wheel first one way and then the other? A. I did see some one; yes, sir.

351

Q. How far away was the *Wolverton* when you saw that? A. Quite a distance away, after the last whistles were blown.

Q. How far off? A. I couldn't tell; I wasn't paying much attention at that time; I seen there was going to be a collision and I got out.

Q. You can't tell how far apart they were at that time? A. No; they were some distance.

Q. As soon as Slover blew the second two whistles didn't you turn to leave the pilot-house—didn't you go immediately out of the pilot-house as soon as he blew the second two whistles? A. I don't know.

352 Q. Whereabouts were you when the two vessels came together? A. I was on the bow of the Cross Creek barge.

Q. Did you go directly there from the pilot-house? A. No, sir.

Q. Where did you go first? A. Went to the cabin of my boat.

Q. I understand you to say yon didn't see Slover make any change in his wheel? A. Not at the time you asked me about.

Q. Did you, at any time, see him? A. Yes, sir.

Q. When? A. I seen him make a change in his wheel to keep a little towards New York shore.

Q. When was that? A. I couldn't tell you when
353 that was—a little before the collision.

Q. Whereabouts—abreast of what point was that? A. It was right about abreast of Pier 1, coming up along there.

Q. You don't mean Pier 1, North River? A. No, sir—East River.

Q. That is just about the time when you saw the *Wolverton*, isn't it? A. About the time I seen the *Wolverton*.

Q. Then you say you were abreast of Pier 1 when you saw the *Wolverton?* A. About along there when I seen her first.

Q. Was that the time when you saw Slover changing his wheel to go in nearer to New York shore?
354 A. No; not that time.

Q. When was it? A. A little after that.

Q. After you got into the pilot-house? A. I didn't see him change the wheel in the pilot-house.

Q. Where were you when you saw him change the wheel? A. On the deck of the boat.

Q. Was that before you went in with the freight ticket? A. That was after I had come out.

Q. How far away was the *Wolverton* at that time when you saw him change his wheel? A. I don't know how far she was, I didn't pay any attention to that at all; I seen there was going to be a collision.

Q. But you did see him change his wheel to star- 355
board? A. Yes, sir.

Q. Do I understand you to say that you saw any change of course on the part of the *Wolverton*? A. Yes, sir; I see the change in her.

Q. What change did you see? A. I see several changes in her.

Q. Tell me one after the other? A. Ask me them, please.

Q. What is the first change you saw on the part of the *Wolverton*? A. The first change, when I heard him blow the first two whistles—he straightened up on his port so as to throw his boat aport.

Q. When the *Packer* blew the first two whistles? A. Yes, sir; and then he went to the other side and 356
pulled his wheel around—pulled it the other way, the contrary way.

Q. Do you mean to say you saw the boat herself change? A. Yes, sir.

Q. Change her direction? A. I seen her change her direction; yes, sir.

Q. What change in the appearance or in the direction of the *Wolverton* did the first movement of his wheel make? A. The first movement of his wheel he would have took the starboard side of the *Packer*.

Q. My question is what change in the direction of the *Wolverton* was made by the first movement that you saw him make? A. It would took the star- 357
side of the *Packer*.

Q. You don't tell me now what the change was in the *Wolverton*?

Mr. McCarthy: I submit he does.

Q. You tell me what might have been the result; but what I ask is, what was the change of the vessel—do you mean to say that you saw the *Wolverton* herself swing? A. Yes, sir.

Q. Which way did she swing? A. She swung to the starboard side of the *Packer*.

Q. And then how was she heading when she had swung that way? A. She didn't swing very far.

358 Q. How much—what did she head for? A. I couldn't say.

Q. Did she swing down so as to head for the *Packer* herself? A. Did she swing down to head for the *Packer?*

Q. Yes; under that swing did she swing so as to head for the *Packer*, or ahead of her or astern of her? A. Astern of her.

Q. So she headed astern of the *Packer* at that time? A. She would have swung so she sterned the *Packer.*

Q. So she pointed for the stern of the *Packer?* A. Pointed for the stern of the *Packer;* yes, sir.

Q. Then you say you saw another change? A.
359 Yes, sir.

Q. How did he change then? A. He changed his wheel the opposite way.

Q. What was the change in the direction of the boat? A. It throwed his boat towards the port side of the *Packer.*

Q. Did it change his boat so that his boat headed ahead of the *Packer* then? *A.* No, sir; not ahead of the *Packer.*

Q. How then? A. Kind of lapping on.

Q. Right for the *Packer?* A. Right for the Cross Creek's bow.

Q. For the bow of the barge? A. Yes, sir.

Q. You didn't hear any whistle from the *Wolver-*
360 *ton*, did you? A. No, sir.

Q. And this change of the wheel of the *Wolverton* that you saw, was that after the first two whistles or the second two whisles? A. It was after the first two whistles I seen the change in the boat.

Q. And before the second two whistles? A. Before the second two whistles; I believe it was in between the whistles.

Q. Was it before the second two whistles? A. What?

Q. These changes that you speak of seeing in the *Wolverton*? A. They were after the first whistles that blowed.

Q. And before the second two whistles? A. Yes, sir. 361

Q. Whereabouts do you say the collision took place—abreast of what point? A. I should think about Pier 2; right abreast that, as near as I can remember.

Q. How far out in the river do you think the collision took place? A. About 300 feet.

Q. I understood you to say that when you were abreast of Castle Garden you thought you were 500 feet off? A. I was, I guess.

Q. You think the *Packer* had come in 200 feet nearer the shore by the time of the collision? A. Yes, sir.

362

By Mr. Wyllys Benedict:

Q. What did Slover do with the ticket when you gave it to him? A. I couldn't remember.

Q. He didn't read it or look at it? A. No, sir; he didn't look at it, as I know of.

Q. Did he take it from you? A. I couldn't say whether he took it or not.

Q. You went in the pilot-house to give it to him, didn't you? A. I went in with that intention, to give it to him; yes, sir.

REDIRECT by Mr. McCarthy:

Q. Was there any circumstance that fixes your judgment as to the distance you were from the shore as you were rounding the Battery; did you see any men on the shore, or hear any talk? A. Yes; I seen three or four men on the shore. 363

Q. When was that? A. I couldn't say what pier it was either.

Q. Was it before or after the collision? A. It was just at the time of the collision that I see them there and took notice, and after the collision I could hear them talk or hollering.

Q. Could you hear what they said? A. No, sir; I could hear them laughing.

364 Q. Could you hear them plainly? A. Yes, sir; hear plainly.

Q. You say you saw the *Wolverton* on the right-hand side of the *Packer*? A. Yes, sir.

Q. That is over the *Packer's* starboard side? A. Yes, sir.

Q. How did the *Wolverton* then seem to be coming? A. The *Wolverton* seemed to be coming towards the *Packer*; she seemed to be coming to the starboard side of the *Packer* when I seen her.

Q. How was her stem pointing—her head? A. It was pointing kind of cross.

Q. Across what? A. Across the tide.

Q. Was it pointing towards the *Packer*? A.
365 Well, no; it wasn't exactly pointing towards the *Packer* when I seen her—pointing towards the *Packer's* stern.

Q. And the *Packer* at that time was heading up in the East river? A. Heading around in the East River; yes, sir.

Q. Was the *Packer*, in your opinion, at the time of the collision lying still in the water or not? A. She was working back.

RECROSS by Mr. Benedict:

Q. When you saw the *Wolverton* first which side of her did you see? A. I see her starboard side when I seen the *Wolverton* first.

366 Q. Did you at any time before the collision see her port side? A. No, sir.

Q. Are you sure about that? A. Well, when she rounded to cross the bow I seen her port side then.

Q. I asked you did you see the port side at any time before the collision? A. That was before the collision.

Q. Did you see the port side at any time before the collision? A. Yes, sir.

Q. How far away from you was the *Wolverton* when you first saw her port side? A. I don't recollect.

Q. About? A. I couldn't say.

Q. A length? A. Oh, longer than that when I see the port side of her; about two of her lengths away. 367

JAMES S. PURNELL, being duly sworn and examined as a witness, testifies:

By Mr. McCarthy:

Q. How old are you? A. Going on fifty-three.

Q. What is your occupation? A. Captain of a barge.

Q. You follow the water? A. Yes, sir.

Q. How long have you followed the water? A. All my life; as far as I can remember. 368

Q. Were you master of the Cross Creek barge at the time of this collision? A. Yes, sir.

Q. Were you on her at the time of the collision? A. Yes, sir.

Q. Whereabouts on her were you when you were rounding the Battery coming down from Pier 9? A. I was in the cabin till just before we rounded the Battery.

Q. Did you observe how near the shore you kept as you were rounding the Battery? A. I should judge about 200 feet.

Q. Did you observe? A. I didn't particularly notice it.

Q. What is your judgment as to the distance? A. I don't think we were any further; we might have been further or less. 369

Q. Are you able to state whether or not you were in the slack water? A. I judge we was; we always go around that way because the barge is very heavy, and we get better weather.

Q. How big a barge is yours? A. 425 tons.

Q. Was she loaded down at that time? A. She was loaded with 375 or 395 tons—I don't know which now.

Q. Is that considered a heavy tow against the ebb tide? A. It is pretty heavy; they hardly ever tow a

370 boat agin the tide unless she has to be to her destination.

Q. Where do you think the collision occurred—opposite what point? A. Right above Hamilton Ferry; I don't know exactly—just above the ferry; the boats cleared our stern.

Q. How far out were you, do you think? A. I don't think I was over 200 feet from the dock at that time, as near as I can get at it.

Q. Did you see the *Wolverton* before the collision? A. Yes, sir.

Q. Which way did you have to look to see her? A. How I come to see her—they blowed two whistles to go on the port side of her.

371 Q. Do you know what the blowing of two whistles means? A. To go on the left-hand side of her.

Q. Left hand side of what? A. Left-hand side of the *Wolverton*.

Q. You heard two whistles blown? A. Yes, sir.

Q. What next did you see? A. I came out to see what was the matter—with my child in my arms.

Q. Did you see the *Wolverton?* A. Yes, sir.

Q. Which way did you look to see her? A. Across the bow of the *Packer*.

Q. That would be to the right, left or straight ahead? A. It would be to the right.

Q. What part of the *Wolverton* did you see—did you see her right-hand side or left, or did you see her full on—bows on? A. I seen her right-hand
372 side.

Q. Couldn't you also see her left-hand side? A. No, sir; not much of it.

Q. You could the bow, couldn't you? A. I could see the bow, but not far on the side.

Q. How did she seem to be coming? A. Appeared like she come over from Brooklyn shore—coming down to go around the Battery.

Q. Was she pointing for you, or above or below you? A. She was pointing on the right-hand side of the *Packer*, as near as I can come to it?

Q. You don't know much about the blowing of whistles at that time, do you? A. No, sir. 373

Q. You never have been in charge of a tugboat? A. That has been a good many years ago.

CROSS-EXAMINED by Mr. Benedict:

Q. You were examined once as a witness in reference to this matter in Philadelphia? A. Yes, sir.

Q. Do you remember being asked, at that time, how far you were from the Battery at the time of the collision? A. Yes, sir.

Q. Do you remember saying in answer that you were a little above the Battery and about 350 feet away? A. Yes, sir.

Q. Was that your judgment then? A. That was my judgment; yes, sir. 374

Q. Have you had any reason to change it since? A. I have seen about where it was since.

Q. Hadn't you seen about where it was then? A. No, sir.

Q. Do you mean to change your testimony now from what you gave it then? A. I change it to the best of my knowledge.

Q. Do you mean now to testify differently as to the place of collision, from what you did when you were examined before? A. I do—by my knowledge.

Q. What makes you change your testimony now from what you gave it before? A. I told you.

Q. I haven't got it; please tell me again, why do you change it? A. Because I think so. 375

Q. What makes you think so? A. Because I have seen the difference since.

Q. What have you seen since? A. I have seen how far it was since; I didn't take much notice then—we didn't expect anything like this, and we didn't take no particular observation of it what the matter was.

Q. My question is, what you have seen since you were examined before which gives you any better knowledge than you had when you were examined? A. It gives me the same knowledge that I think is

376 right; I ain't going to tell you anything what I wouldn't swear to.

Q. What knowledge have you now that you didn't have when you were examined before? A. I told you what.

Q. No, you haven't; tell me of any single fact that you know now that you didn't know then? A. I am not going to tell you anything different.

Q. Do you know anything about it now that you didn't know before when you were examined? A. Didn't I tell you I had been there dozens of times since?

Q. Hadn't you before? A. I had been there before, of course.

377 Q. What do you know now that you didn't know then? A. Because we didn't take no particular observation of it then.

Q. You can't tell any fact that you know now that you didn't know then? A. No.

Q. I understand you to say that you came out from the cabin of your barge when you heard two whistles? A. Yes, sir.

Q. Did you hear any other two whistles? A. No, sir; I didn't take any notice of any more.

Q. When you came out, which side of your barge did you come out of? A. I came out on the starboard side of my barge.

Q. That is the side between you and the tugboat?

378 A. Between me and the tugboat.

Q. How far forward? A. I went forward so I could see over the *Packer's* bow.

Q. Then you saw the *Wolverton*, did you? A. I saw the *Wolverton*.

Q. And that was the first that you had seen of her? A. That was the first I had seen of her.

Q. How far away do you think she was? A. I guess she was about 300 yards from the *Packer*.

Q. Give it to me in lengths of your boat; how many lengths of your boat do you think she was away? A. I couldn't give it to you that way; I give it 300 yards as near as I can come to it.

Q. Do you think she was as far away as your barge is long? A. As far away? Of course she was, farther away at that rate. 379

Q. More than one length of your barge? A. Of course.

Q. How many lengths do you think? A. I couldn't tell you.

By Mr. McCarthy:

Q. Can't you approximate to it? A. He can add up 300 yards as well as I can, and make an estimation on how many lengths of my boat it was.

By Mr. Benedict:

Q. You were asked, when you were examined before, as to how far the *Wolverton* was away when you first saw her? A. I suppose so. 380

Q. Didn't you then say you thought she was about 350 feet away? A. I don't think I did; I think it was yards.

Q. If you say then it was about 350 feet, you meant to tell it as you thought it, didn't you. A. I did.

Q. And have you any better knowledge on that point now than you had then? A. No.

Q. No; did you notice any change in the direction of your boat after you saw the *Wolverton?* A. No, sir.

Q. Did you notice any change in the direction of the *Wolverton* after you saw her? A. No; only coming across our bow. 381

Q. Was that a change in his course? A. Of course it was.

Q. That depends upon how he was heading before? A. He couldn't get afoul of me unless he crossed my bow.

Q. You have said he was heading across you when you first saw him, as I understand? A. Across the bow?

Q. Wasn't that so? A. Not exactly; he was heading for the starboard side.

382 Q. Your attention hadn't been attracted, had it, to the navigation of your boat, until you heard these two whistles? A. No, sir.

Q. How long had you been in the cabin before the whistles blew? A. I didn't take the time.

Q. Had you been in the cabin all the way down from Pier 9? A. I don't know; I was first on deck and then in the cabin; I don't remember.

REDIRECT by Mr. McCarthy:

Q. Do you think you said 350 feet when you testified before? A. I think I did.

Q. And now you say 350 yards? A. I say 350 yards I meant.

383 Q. When you testified in Philadelphia? A. 350 feet I mean instead of yards.

Q. When? A. When I testified in Philadelphia.

Q. You said in Philadelphia that when you saw the *Wolverton* she was about 350 feet away; isn't that what you said? A. Then that is right.

Q. And now you say it was 350 yards? A. I said 200 feet in my testimony here.

Q. How far was the *Wolverton* from you according to your judgment when you first saw her? A. The *Wolverton?*

Q. Give us your best judgment? A. I guess she was about 300 fathom; 300 yards I mean.

Q. Give it in your own boat's lengths; how many
384 of your boat's lengths would it be? A. I couldn't reckon that unless I took a pencil; about four; I am 113 feet long.

Q. If in Philadelphia you said she was 350 feet away—do you think you did say so? A. I don't know whether I did say so or not.

Q. How do you explain the fact that you said in Philadelphia 350 feet, and now you say 300 yards? A. How do I say it?

Q. Yes; how do you explain the different testimony? A. Well, I don't know.

Q. Suppose you were asked the question again; is it your best judgment that she was four of your boat's

lengths away when you saw her first? A. Yes, if not 385
more; that is my judgment.

Q. Where were you when you heard the two whistles blow? A. I came out of the cabin.

Q. Were you in the cabin when you heard them blown? A. I don't know whether I was or not.

Q. Haven't you said that you heard the whistles blown and then took a child in your arms and came out to see what the matter was? A. Yes, I brought her out.

Q. Why did you come out? A. I thought something might occur.

Q. What had you heard to make you think that? A. I always look out for such things.

Q. What had you heard? A. I wanted to see 386
whether the boats went on the right side for the whistles or not.

Q. Had you heard the whistles? A. I had heard two whistles.

Q. Before you came out of the cabin? A. Yes, sir.

Q. And you brought your child out in your arms? A. Yes, sir.

Q. And went forward? A. Yes, sir.

Q. And then you saw the *Wolverton*? A. Yes, sir.

Q. You're a one-armed man, are you not? A. Yes, sir.

387

STEPHEN SLOVER further examined

The Witness: I would like to rectify a mistake that I made on Saturday.

By Mr. McCarthy:

Q. What is it? A. I said that we were 200 yards off of the Barge Office. I was down there and made an examination and it wasn't over 250 feet off.

Q. When were you there and made an examination? A. On Friday.

388 Q. What sort of an examination did you make? A. I was on the pier Friday.

Q. What pier? A. Pier 1.

Q. What sort of an examination did you make? A. I saw boats passing up and down there about in the same place that I was in at the time.

Q. What kind of boats? A. Steamboats.

Q. Tugboats? A. Yes, sir; tugboats with boats alongside,

Q. Did you take a note of how far it is from Pier 1 to Pier 2 across that slip? A. About 200 feet I should say.

Q. Did it seem to you then that that was about the distance that you were away from the end of
389 Pier 1 when you went around it? A. Yes, sir.

Q. And what do you say with regard to the distance from the new Barge Office passing around there? A. I guess it was about that distance off there; not much difference.

Q. So that your best judgment is that you were 250 feet away from the Battery as you went around? A. Yes, sir.

Q. Are you sure as to whether or not you were in the slack water? A. Yes, sir; I was in the slack water.

Q. When was it that you saw the tug on the port side and bow of the *Wolverton?* A. When she was crossing our bow; after she had hauled to go across
390 our bow then I saw her port side.

Q. How did she appear to you when you first saw her—when you saw her in the middle of the stream? A. She was head on.

Q. Head on what part of you? A. She was about heading for our stern when first I saw her.

Q. When the *Wolverton* took her port sheer on the port wheel—that is, sheered in toward the New York piers, what kind of a sheer was it? A. Hauled his boat up to the starboard then.

Q. How many points should you say? A. I couldn't say how many points.

Q. Was it such as to completely change her course? 391
A. Yes, sir.

Q. In your judgment would he have passed you if he had not done that; would he have passed you in safety? A. Yes, sir; I think he would.

Q. On which side would he have gone? A. On the starboard side.

Q. And nearer to the middle of the river? A. Yes, sir.

Q. Did you starboard your wheel before you blew the whistles? A. Yes, sir; I think I did.

Q. What was the effect on your movements of that heavy tow on your port side? A. It had a tendency to draw her in shore more.

Q. How strong a tendency was that? A. She 392
went in somewhat; I can't say how much.

Q. Was the tendency a strong one or not of the tow on her port side to haul her in? A. Yes, sir.

Q. How did that affect the navigation of your boat; for example, having that tow on your port side, supposing you wanted to get to port, what would you have to do with your wheel? A. Put it to starboard.

Q. Would that be necessary in order to send your boat to port if you had this barge on your port side? A. Not very much; you wouldn't have to put your wheel to starboard but very little.

Q. What was it necessary to do in order to prevent going in, if anything; was it necessary to do 393
anything to prevent going in to the New York shore as you were rounding the Battery; how about your wheel—how did you have your wheel as you were going around the Battery? A. The wheel was a little to port, if anything.

Q. Why was that? A. So as to steady the barge; the barge was so heavy.

Q. To counteract the effect of the weight of the barge? A. Yes, sir.

Q. Where, in your opinion, were you when you first sighted the *Wolverton*; where was your tug? A. Right off the Barge Office.

394 Q. How far did you go before the collision occurred? A. We got right abreast of Pier 1 and Pier 2.

Q. How many hundred feet is it, to the best of your knowledge, from the Barge Office to Pier 2; if you can't get it accurate don't try? A. I have already said from Pier 1 to Pier 2 is about 200 feet.

Q. How far it is from the Barge Office to Pier 1? A. About 150 feet from the Barge Office to Pier 1.

Q. So that from the Barge Office to Pier 2 would be about 350 feet? A. Yes, sir.

Q. And that was where the collision occurred? A. Yes, sir.

The Court: He said between the two.

395 The Witness: Yes, sir; between the two.

Q. How far off from the New York shore or New York piers was it that the collision occurred? A. A couple of hundred feet.

Q. When you first saw the *Wolverton* she was whereabouts? A. Near the middle of the river.

Q. How far do you think your tug had gone from the time when you blew your whistles until the time when the collision occurred? A. She went about a length of the barge.

Q. That is something over a hundred feet? A. I guess she is; yes, sir.

By the Court:

396 Q. Didn't you blow your whistles twice? A. Yes, sir.

Q. Do you mean the first or second whistles? A. The last whistles.

Q. You mean the second whistles then? A. Yes, sir.

By Mr. McCarthy:

Q. About a hundred feet? A. Yes, sir.

Q. That is your best judgment? A. That is as near as I can get it.

Q. How fast do you think the *Wolverton* was

going by the land? A. I guess about seven miles an hour—something like that. 397

By the Court:

Q. How long were your second whistles after your first whistles? A. Very short—quite close together.

Q. How fast were you going by the land, do you think? A. About two miles an hour, I should think.

CROSS-EXAMINED by Mr. Benedict:

Q. You have been examined about this matter before, haven't you? A. Yes, sir?

Q. And gave your testimony on the case which was tried in Philadelphia? A. Yes, sir.

Q. And before that examination you had talked the matter over with Mr. McCarthy, had you not? 398
A. I don't know as I did.

Q. You had told him the facts as nearly as you could? A. Yes, sir.

Q. And you meant to tell the facts very accurately, did you? A. As near as I could get at it; yes, sir.

Q. And when you were examined before as a witness you meant to tell the story just as well as you knew? A. Yes, sir.

Q. And when you were examined here in Court two or three days ago, you meant to tell the facts just as you understood them, did you? A. Yes, sir.

Q. And now haven't you on every time before this said that when you saw the *Wolverton* she bore on 399
your starboard bow? A. On our starboard quarter; yes, sir.

Q. Starboard quarter? A. Starboard bow; yes, sir.

Q. You know the difference between the bow and the quarter, don't you? A. Yes.

Q. You have said every time, haven't you, that she was on your starboard bow? A. Yes, sir.

Q. Do you mean to change that now? A. No, sir.

Q. You have also said every time you have been examined before, have you not, that as you were going around the Battery you were going around at

400 about 200 yards off? A. I made a mistake then. I wasn't certain.

Q. Now you want to change that, do you? A. Yes, sir.

Q. How did you come to make that change in your testimony? A. I went down there and looked at it.

Q. Wasn't it suggested to you that you had got that distance too far off? A. It was not.

Q. Not by anybody? A. No, sir.

Q. What did you see when you got down there that made you say now that you were only 250 feet off, whereas you said before you were 200 yards? A. I saw tugboats going around there and I went around there on a tugboat myself yesterday (Sunday,
401 May 20).

Q. How does that tell you anything as to what you did on that occasion three years ago? A. I had a good look at it and I examined it.

Q. Did you make any measurements yesterday? A. No, sir; I did not.

Q. Or when you were down there on Friday? A. No, sir.

Q. It is only your judgment after all? A. Yes, sir.

Q. You know the difference between 200 feet and 200 yards, don't you? A. Yes, sir.

Q. What is the difference? A. A yard is three feet.

402 Q. So that the difference is that you said before that you went around three times as far off as you say now? A. Yes, sir.

Q. Are you able to fix this distance by any point that you were heading for? A. We wasn't heading for any particular point.

Q. Then there is no point off which you can fix it? A. Only the distance off from shore.

Q. Only your judgment of the distance off shore, and you can't fix it by any point that you were headed for? A. No, sir.

Q. Do I understand you to say that you think that you came down by Pier 1, North River, only

200 feet off? A. I might have been more than 200 403
feet off.

Q. Under what sort of a wheel did you come down around from Pier 1, North River? A. Came around on a starboard wheel.

Q. Starboard wheel all the way? A. Most all the way; yes, sir.

Q. And isn't it the fact that as you came down towards the Barge Office you were coming in nearer to the New York shore? A. Yes, sir.

Q. You said when you were examined here in court the other day that your wheel was a little aport? A. It might have been aport at times.

Q. But haven't you just now said that you came around under a starboard wheel all the way; you 404
have just testified so, haven't you? A. Yes, I said so.

Q. Then do you still say that your wheel was a little aport? A. It was aport at times enough to steady the barge.

Q. When was it aport? A. I couldn't tell you that.

Q. Abreast of what on the New York shore do you say you were when you first saw the *Wolverton*? A. Right off of the barge office.

Q. Right off the barge office? A. Yes, sir.

Q. And how far did you run from that time when you first saw her until the collision; how far did you go yourself? A. I guess it was the length of the 405
barge.

Q. Which is how long? A. Over a hundred feet.

Q. You think you didn't run over a hundred feet from the time you saw the *Wolverton* until the collision? A. I think I ran a little more than a hundred feet.

Q. How much more? A. I don't know how more, something more I guess.

Q. Can you tell us how long a time you think it was from the time you first saw the *Wolverton* until the collision? A. It might have been a minute and a half or two minutes.

406 Q. Do you know how far you would run in two minutes? A. I wouldn't run very far.

Q. Do you know how far you would run at the rate of two miles an hour? A. No, sir; I couldn't tell you.

Q. How far away do you think the *Wolverton* was when you first saw her? A. She was near the middle of the river.

Q. How far away? A. Five or six hundred yards.

Q. You mean yards not feet now, do you? A. As near as I can get at it.

Q. I want to know whether you mean yards or feet? A. Yes, sir; I mean it.

407 Q. You mean yards? A. Yes, sir.

Q. Do you know what part of a mile that is? A. No, sir.

Q. What is your idea as to the part of a mile she was away from you? A. She might have been a quarter of a mile, or nearly so.

Q. Did you blow your two whistles soon as you saw her? A. Right after I saw her; yes, sir.

Q. And you starboarded your wheel? A. I might have starboarded; yes, sir.

Q. And you kept on how long before you blew the second two whistles? A. A very short time.

Q, How long; how far did you run? A. I don't think it was over a minute.

408 Q. Do you think you ran a length of your boat? A. No, sir.

Q. Then you blew the two whistles, and how far away was the *Wolverton* from you then? A. After I blew the two last whistles I guess she was a couple of hundred yards off.

Q. You think she ran 300 yards then from the time you blew your first two whistles until the time you blew your second two whistles? A. Yes, sir.

Q. Have you any idea how long it would take her to run 200 yards? A. No, sir.

Q. You said when you were examined the other day that you thought that between the time you

blew the first two whistles and the time you blew 409
the second two whistles, the *Wolverton* had come ahead about a length; do you think she was two or three hundred yards long? A. I might have said so.

Q. What do you say; do you think she was two or three hundred yards long?

Objected to.

A. No, sir.

Q. When you said that you thought the *Wolverton* was about a length nearer, how much in length do you calculate that? A. I could not tell you exactly how far she did come ahead; I didn't take any particular notice.

Q. Of course you didn't take any particular notice, 410
but you said then you thought she had come ahead about a length in the time between your blowing those two sets of whistles; how many feet do you count that? A. I couldn't tell you.

Q. You say that you think the *Wolverton* came ahead a length, or came ahead two or three hundred yards? A. I think she came ahead a couple of hundred yards or so.

Q. When you blew your second two whistles did you do anything with your wheel? A. I starboarded the wheel some.

Q. Again? A. Yes, sir.

Q. A second time? A. Yes, sir.

Q. How far away do you think the *Wolverton* 411
was from you then? A. Oh, she wasn't so very far off; a short distance.

Q. How far? A. A couple of hundred yards off.

Q. A couple of hundred yards off when you blew the second two whistles? A. Yes, sir.

By the Court:

Q. Do you say 200 feet or 200 yards? A. A couple of hundred yards.

Q. When you blew the second two whistles? A. Yes, sir.

412 By Mr. Benedict:

Q. I understand you to say that when you first saw the *Wolverton* you thought that the barge was a little more down the river than the *Wolverton* was? A. Yes, sir.

Q. Was she enough farther down so that you could see her port side any plainer than you could see the port side of the *Wolverton*? A. I didn't take any particular notice about that; she was down farther than the tug was.

Q. Were they so that you could see the port side of both of them? A. No, sir; I couldn't see the port side of the tug at the time.

Q. Could you see the port side of the barge? A. I
413 think I did; yes.

Q. From that time you were going under a starboard wheel; that made you head more towards the New York shore than before? A. Yes, sir.

Q. And from that time when you first saw her were you not continually seeing more and more of their port side? A. I don't know as I was.

Q. Just think of that; was there any time when you saw the starboard side of either of them? A. I saw the starboard side of the tug.

Q. When? A. All the way excepting until she sheered up to cross our bow.

Q. When was it that you saw the starboard side of the tug? A. When I first saw her.

414 Q. Do you say that you saw the starboard side of the tug, that you saw the barge was swinging off lower down the river than the *Wolverton* was?

Objected to as arguing with the witness.

A. Yes, sir.

By the Court:

Q. When you first saw the *Wolverton*, did you see her port side or starboard side? A. I saw her starboard side.

Q. When you first saw her? A. Yes, sir.

By Mr. Benedict: 415

Q. But didn't you testify when you were examined here on the stand the last day that you were examined, that you were on the port side of the *Wolverton?* A. I don't know as I did.

Q. Do you mean to change your testimony in that respect from what you testified here the last time you were examined? A. I mean to say I was on her starboard side.

Q. What I want to know is, are you intending to testify different now from what you testified before? A. That is what I mean.

Q. Did you ever testify before that you were on her starboard side? A. I think I did.

Q. Did you testify so when you were examined in the other suit? A. I don't remember. 416

By the Court:

Q. Have you at this moment any recollection how the *Wolverton* was heading when you first saw her? A. She was heading right astern nearly; right for our starboard quarter.

Q. Can't you describe it by something by the land? A. No, sir; I cannot.

By Mr. Benedict:

Q. When you were examined in the Philadelphia suit, were you not asked (p. 61 of printed testimony), "How did the *Wolverton* have you?" and did you not answer, "She was on my starboard bow?" A. Yes, sir. 417

Q. Were you not asked this question, "How were you as to her; did she have you on her starboard bow or on her port bow?" and did you not say, "She had me on her port bow; she was on my starboard bow?" A. I don't think I did; I might have stated so.

Q. And were you not asked to take a piece of paper and draw a diagram of their positions? A. I don't remember.

418 Q. Don't you remember making a diagram on a piece of paper when you were examined? A. I made a diagram.

Q. Are you prepared to swear that when you made that diagram when you were examined before, you did not put the vessels so that the *Wolverton* had you on her port bow instead of her starboard bow?

Objected to on the ground that the diagram must be shown to the witness if he is to be cross-examined upon it.

The Court: You are entitled to ask him if he did not make a diagram placing her on the port side.

The Witness: I don't think I made it that way.

419 Q. That does not quite answer the question; the question is whether you are prepared to swear that you did not? A. No, sir; I don't know positively whether I——

Q. You were asked, were you not, as to what course the *Wolverton* was heading, and didn't you say that she was heading about east by south, or something like that?

Mr. McCarthy: I think that was a clear mistake.

A. That was a mistake, and I answer that there was a mistake.

Q. How do you say now?

Mr. McCarthy:

420 Q. Do you mean by compass?

Mr. Benedict: I am asking by compass.

A. I don't know how she was heading.

Q. Were you a licensed steamboat pilot at the time of this accident? A. Yes, sir.

Q. How long had you been licensed? A. I think I had my second license—second year.

Q. You were not master of the *Packer*, I think? A. No, sir.

Q. Who was master of her? A. Captain Kellam.

Q. Who else was in the pilot house with you? A. The deckhand was up there and a young fellow off of the barge.

Q. Who was the deckhand? A. Larry Shields. 421

Q. When did he come into the pilot-house? A. I couldn't say; it was just before the collision.

Q. Before you saw the *Wolverton* or after? I think it was before.

Q. Were you past Castle Garden? A. That's about the time that I came around Castle Garden.

Q. Do you remember when the man off the barge came into the pilot-house? A. No, sir.

Q. How many boats had the *Packer* brought from Port Johnson? A. Two, I think.

Q. Only two? A. I think it was two; yes, sir.

Q. Were you not examined in reference to that in the other case, and did you not say it was three? A. I might have said more; I don't remember now 422
how many she did have.

Q. Had you gone to any other pier except Pier 9? A. No, sir.

Q. Don't you remember how many you left there? A. I think we left one there.

Q. Do you remember where you had the other boat coming up from Port Johnson; on which side of you? A. I had her on our port side, I think; I don't remember changing her.

Q. That is the same side as the Cross Creek boat? A. We had the Pier 9 boat on the starboard side, and the Cross Creek No. 5 on our port side.

Q. Didn't you have any barge on the other side? A. I don't think we did. 423

Q. Where did you meet the ebb tide? A. The East River tide?

Q. The ebb tide? A. Coming down North River?

Q. Whereabout did you meet it; before you got to Governor's Island? A. Yes, sir.

Q. Did you have any difficulty in towing this barge against the ebb tide? A. Not much.

Q. You went right along just as you always do? A. Not very fast; but went along.

Q. As you always do? A. Yes, sir.

Q. You had no difficulty in managing them, had you? A. No, sir.

424 By the Court:

Q. You had three then? A. I think it was two we had.

By Mr. Benedict:

Q. Did you have charge of the wheel coming up from Port Johnson to Pier 9? A. Most of the way —yes, sir.

Q. How long would it take you against the ebb tide to stop your boat with that tow? A. A very short distance.

Q. You could stop her in running half her length if you put a reverse motion on your engine? A. I
425 guess we could.

By Mr. McCarthy:

Q. You could do it in less time, couldn't you, against the ebb tide? A. If the tide was running strong we could.

By Mr. Benedict:

Q. How far away do I understand you to say that you thought the *Wolverton* was from you when you stopped and backed your engine? A. Might have been a hundred and fifty yards or something like that.

426 Q. And how do you say she was heading with reference to you at that time? A. They commenced to head up the river then.

Q. Was she heading across your bow at that time? A. Not exactly—no, sir.

Q. Still not heading across your bow? A. No, sir.

Q. That is, not heading further to the eastward on the shore than your bow? A. No, sir.

Q. Did you have the ebb tide against you when the collision took place? A. There wasn't but very little tide in there.

Q. Do you mean to say that you were in the ebb tide or in the eddy? A. We wasn't in the eddy tide. 427

Q. The eddy tide was setting the way you were going, was it not? A. No, sir, not altogether.

Q. How then? A. The tide was slacker in there than it was out in the middle of the river.

Q. Is that what you mean by an eddy tide? A. Yes, sir.

By the Court:

Q. You don't mean a back eddy—back water? A. No, there was no back water; the tide was slack along shore.

By Mr. Benedict: 428

Q. The tide was an ebb tide against you? A. The tide was slack water.

Q. But the tide was against you, was it not? A. There wasn't much, anyhow.

Q. What there was, which way did it go? A. (No answer.)

By the Court:

Q. Do you speak of the actual time of the collision? A. Yes, sir; there wasn't any tide of any account where I was.

Q. When; at the time of the collision or before it? A. At the time and just before it. 429

By Mr. Benedict:

Q. At what point in the navigation was it that you had an ebb tide against you? A. Before we got in the slack water.

Q. How far had you run in the slack water before the collision? A. Not very far.

Q. How far; over a length? A. Yes, sir; I guess so.

Q. A length? A. Yes; more than a length.

Q. In the slack water more than a length? A. Yes.

430 By the Court:

Q. You said a few moments ago, by way of correcting your former evidence, that you judged now that you were only 250 feet off the Barge Office; that is the dock, I suppose? A. Yes, sir.

Q. Off some of the piers you were only 250 feet at the moment of the collision? A. Yes, sir.

Q. Have you stated how much you would go in towards the shore under your starboard wheel from what you had been before; as I understand you, you were making for the shore at the time? A. Some; very little.

Q. You were heading, at the time of the collision, so as to make into the shore somewhat? A. Yes,
431 sir.

Q. Now, under that direction, how much do you think you had run in from what you had been before? A. Very little.

Q. Can you give us any idea in feet or yards? A. No, sir.

By Mr. Benedict:

Q. You had been going under a starboard wheel all the while at any rate?

Mr. McCarthy: I don't think the witness understands what you mean by that.

The Court: In order to keep his boat steady he had to keep his wheel a little starboard in that tide.
432 The Witness: Yes, sir; that's what I mean.

Q. How fast do you say, when you had both boats in tow coming up to Pier 9, you were able to come up against the ebb tide? A. The tide wasn't running so strong then as it was at the time of the collision.

Q. How fast were you able to run is the question? A. I don't know.

Q. Don't you know how fast you could tow those two boats with the *Packer* against the ebb tide?

Mr. McCarthy: What kind of tide, strong or what?

Mr. Benedict: We will say a strong ebb tide. 433

Q. You might take her a mile and a half or so, the two of them.

Q. How fast could you take the one boat along by the land against a strong ebb tide? A. About the same I guess; there isn't much difference; there isn't but very little difference.

Q. And how fast do you count the tide on that? A. I don't understand your question.

Q. Against how many miles an hour of tide do you count that? A. About four, I should say.

Q. So that you would make her going about six and a half miles an hour through the water? A. Yes, sir; something like that.

434

By the Court:

Q. In perfectly slack water how fast do you think the *Packer* could go with a tow of tow barges, as you run? A. About four miles and a half an hour.

By Mr. Benedict:

Q. Do you think you ran in what you call this eddy tide? A. I don't understand you.

Q. You say that at the time of the collision you think you were in what you call the eddy tide, and that there was not much tide there? A. Very little.

Q. What I want to know is how far you ran 435
in that eddy where there was not but very little tide? A. I suppose a couple of lengths of the barge.

By the Court:

Q. Was it already the strength of the ebb in the North River? A. No, sir; not quite.

By Mr. Benedict:

Q. Was there anything to prevent you from seeing the *Wolverton* before you got to the Barge Office? A. No, sir.

436 REDIRECT by Mr. McCarthy:

Q. Where would the *Wolverton* have struck Jersey shore if she had kept on the course she was headed when you first saw her? A. Might have hit down below the Communipaw docks—the coal docks.

Q. Is that your judgment? A. I think so, about that.

Q. Was not the effect of her porting her wheel to change her sides—that is to change the side that she presented to you—do you understand the question? A. No, sir.

Q. You saw her port her wheel? A. Yes, sir.

Q. What side did that bring to you? A. Brought
437 her port side.

Q. And before that you had seen her bows on, and her starboard side? A. I saw her starboard side; yes, sir.

Q. I want to ask you again whether your attention was particularly called to this matter of distance from the Battery until Friday? A. No, sir; I didn't think enough of it to go look at it before.

Q. What you said in Philadelphia was your best judgment? A. Yes, sir; it was guesswork.

Q. Are you able now to speak more positively about it after the examination that you made on Friday? A. Yes, sir.

Q. Do you remember whether the *Packer* had a
438 full head of steam on at this time? A. I don't know about that.

Q. Suppose when you blew your whistles you had attempted to get outside of the *Wolverton* and her tow, taking the rate of speed that the *Wolverton* was going and the course she was heading; is it your judgment that you could have got around her safely? A. I don't think we could; no, sir.

RECROSS by Mr. Benedict:

Q. Suppose you had tried to get around her a couple of minutes earlier; then you could have got

around her, couldn't you? A. I don't think we could; he was setting down too much. 439

Q. Not if you had tried to do it a couple of minutes before? A. When I first saw her I might; it was according to how he would act.

Q. Suppose that he would have gone the same way that he did go? A. Then I couldn't.

Q. How much further back would you have had to start to go under her stern? A. Some distance.

Q. A length? A. Yes, sir; more than that.

Q. Two lengths? A. I guess so.

Q. In two lengths you think you could have done it? A. No, I couldn't have done it in two lengths.

Q. How far do you think you would have had to be away from him in order to have ported your wheel and gone under his stern? A. If he had kept his course? 440

Q. Yes, if he had done just what he did do? A. I didn't know what he was going to do.

By the Court:

Q. Suppose at the time you had proposed to go astern of her that you had blown one whistle instead of two how far away do you say you must have been from her in order to have gone under her stern, she doing just what she did do? A. I don't understand that; I don't know about that.

Q. Suppose that when you had first seen the *Wolverton* you had intended to go under her stern how far back would it have been necessary for you to be so as to have cleared her by porting your wheel, giving her one whistle at the same time? A. I would have had to be farther back than I was. 441

By Mr. Benedict: How much farther back is my question? A. I ought to have been back a hundred yards.

By the Court:

Q. A hundred yards from what? A. A hundred yards from where I was.

442 By Mr. Benedict:

Q. Do you know what the rules are with reference to steamboats that are meeting head and head—as to how they shall pass each other? A. I think I do.

Q. Tell me what is the rule?

Objected to on the ground that no foundation has been laid. Objection overruled.

A. Haven't you got them here?

Q. What is the rule when two vessels are meeting head and head; the pilot rule is what I mean? A. I cannot answer that.

Q. You do not know what the pilot rules require in that position? A. Yes, sir.

443 Q. What do they require?

No answer.

By the Court:

Q. Do you understand the question? A. No, sir; I do not.

Q. He meant to ask you, in case two steamers are approaching each other near head on, if you know what the pilot rule is in respect to blowing whistles and taking a course? A. No, sir; I do not.

Q. Do you know what the usual rule of navigation in such a case is; that is, two steam vessels approaching each other so as to be head on, or nearly head on?

444 A. I understand you.

Q. Do you remember how the rule requires you to go, or isn't there any rule about it? A. Yes, there is a rule, but I don't remember what it is.

By Mr. Benedict:

Q. Don't you know what the law requires you to do in a case like that? A. No, sir.

Q. Do you know what is required of two steamboats which are meeting so that they are end on or nearly so? A. No, sir.

Q. Have you got a license now as pilot? A. Yes, sir.

REDIRECT by Mr. McCarthy: 445

Q. Suppose you are meeting a steamer, and you are on a steamer, and you want to go to the right, what would you do with your whistles? A. I would give the one whistle.

Q. Now, suppose you wanted to go to the left what would you do? A. I would give him two whistles.

Q. So that when you are meeting head and head what do you generally do—go to the right or to the left? A. Depends on circumstances.

Q. Take ordinary circumstances? A. Generally go to the right.

Q. And you generally then blow how many whistles? A. One whistle. 446

Q. When, however, in exceptional circumstances, you want to go to the left how many whistles do you blow? A. Two.

Q. Well, you know, then, don't you? A. Yes, sir.

Q. That is what is called the steamboat inspector's rule, isn't it? A. Yes, sir.

Q. You have heard that, too, haven't you? A. Yes, sir.

Q. And you have got that posted in your pilot office, haven't you? A. Yes, sir.

Q. Now, I ask you whether it would have been safe and prudent at any time after you saw the *Wolverton* with that tow behind her for you to have 447 attempted to go to the right? A. No, sir; I don't think it would.

Q. Tell me why? A. We couldn't have gained anything by going out around.

Q. Why not? A. On account of the tide.

Q. What else, is there any other reason? A. That wasn't our place over there.

Q. Suppose you were making a mile and a half where you were; and suppose you had gone out in the middle of the river with that tow clinging to your port side; how fast could you have gone out in the middle of the river? A. A very little.

448 Q. A "very little" may mean an inch; give me something more definite than "a very little"; how fast could you have gone in an hour if you had gone outside? A. I couldn't tell you.

Q. Could you have gone as fast as you were where you were going? A. No, sir.

Q. Could you have gone half so fast? A. No, sir.

Q. Did you have any reason to suppose when you blew the whistles to the *Wolverton* that she was going to take a rank sheer to the right? A. No, sir.

Q. Did you suppose from what your experience of navigation teaches you that when you saw the
449 *Wolverton* first she would go down stream on the right hand side? A. Yes, sir.

Q. Suppose, when you blew your two whistles first she had responded by blowing one whistle what would you have done? A. I would have had to stop my boat.

Q. You would have stopped right away? A. Yes, sir; that is all I could have done.

Q. You wouldn't then have attempted to go outside of her, would you? A. No, sir.

RECROSS by Mr. Benedict:

Q. You would have stopped your boat to permit her to go ahead of you? A. I would have stopped
450 and backed.

Q. That would have been the reason—to allow her to go ahead of you? A. She couldn't have got ahead.

Q. That is what you would have done? A. I would have done all I could.

REDIRECT by Mr. McCarthy:

Q. You would have done all you could have done to prevent the collision? A. Yes, sir.

Q. You say it wasn't your place to be over there; why wasn't it your place to be there; where did you mean? A. Out in the middle of the river.

Q. Why wasn't it your place? A. It isn't customary. 451

Q. You didn't understand that there was any rule of navigation that required you to go under the stern of the *Wolverton* and the *Atlanta?* A. It is not customary.

Q. You didn't understand there was any such rule? A. No, sir; I don't understand.

Q. What I mean is this; did you understand that there was any rule of navigation which required you, in the position that the boats were, to port your wheel instead of starboarding? A. I don't think there was, for me to go outside.

Q. You didn't understand it? A. I think not.

Q. Now, I ask you this question; if you don't 452 understand that where two vessels are crossing each other there is any such rule as that the one that has the other on her starboard is bound to keep out of her way; do you understand there is any such rule as that? A. Not in all cases.

Q. Do you understand that there is that rule in any case? A. In some cases there may be.

Q. I am speaking about the requirements of the law; do you know what the requirements of the law is with reference to vessels crossing each other in that way? (No answer.)

Q. I will put it in this way: You say that you saw the *Wolverton* on your starboard bow? A. Yes, sir. 453

Q. Now, I want to know what you understand to have been the requirement of the law with reference to what you would do with the boat in that position?

Objected to. Question withdrawn.

Q. Showing witness a sheet of paper marked with outlines of two vessels. Suppose two steam vessels are in those positions, and they are at such distance that risk of collision is involved; what do you understand is the requirement of the law of

454 pilots on these two steamboats? A. That all depends on circumstances.

By the Court:

Q. Leaving out all special circumstances, suppose you have got plenty of room and there is nothing to prevent either vessel going as she pleases; that they are steamers, and that they are so near each other as to involve a risk of collision; now, can you tell what is required by law of either vessel? A. I don't know anything about the law.

Q. Take it in this way: if there is danger of collision with the vessels going as I have described, will you state what you understand to be the duty
455 of each vessel? A. If there is danger of a collision?

Q. Yes; in the relative positions shown on that diagram—suppose there is danger of collision; what should each vessel do there? A. This one here marked A on the diagram should blow one whistle and go on the other's starboard quarter to the right.

Q. What has B got to do? A. He has got to try and get out of the way.

(Diagram is hereto annexed.)

RICHARD FIRMAN, being duly sworn and examined as a witness for the claimants, testifies:

By Mr. McCarthy:

456 Q. Where do you reside? A. South Amboy.

Q. What is your occupation? A. Engineer.

Q. Were you aboard the *Packer* at the time of this collision between the barge *Atlanta* and Cross Creek Barge No. 5? A. Yes, sir.

Q. Where were you? A. In the engine room.

Q. Were you a witness of the collision? A. Yes, sir, I saw it; I didn't see the collision but I saw it before.

Q. Saw what led up to it? A. Yes, sir.

Q. Give us your best judgment as to how far the *Packer* and her tow was from the Battery as she

rounded the Battery before the collision; how far off was she from the new Barge Office and from the end of Pier 1? A. I should say she was round about three or four hundred feet off the Battery; we draw a little nearer to the Barge Office when we go around there. 457

Q. How far off do you think you were from the Barge Office? A. We was about three hundred feet—between three and four hundred feet, I should think, from the Barge Office.

Q. How far off were you from Pier 1? A. About two hundred feet; I think the pier is about one hundred feet long.

Q. That is at the Barge Office? A. Yes, sir; it extends out. 458

Q. How far do you think it is from the Barge Office in a straight line to the end of Pier 2? A. 350 or 400 feet to the end of Pier 2.

Q. How fast were you going—are you able to tell from your engines? A. No, sir; I ain't got no way to tell; I suppose we were going not over a mile and a half past the land.

Q. Is it your judgment that you were in the strength of the tide, or in the slack water? A. No; we were in slack water; we were not in the strength of the tide and we were not in the slackest of the water.

Q. How far out do you think you have to go from the Barge Office to get into the strength of the tide when the tide is half ebb? A. A considerable ways from the Barge Office; the further up you get the closer in the tide is. 459

Q. Estimate it—how far from the Barge Office would you have to go to get into the strength of the tide? A. Ain't much tide there at all, off the Barge Office; two tides meet there and make an eddy.

By the Court:

Q. How far off from the Barge Office would you have to go to get into the strength of the tide when the tide is half ebb? A. 250 yards or 300 yards.

460 By Mr. McCarthy:

Q. When you get up to Pier 2 how far off would you have to go? A. You get the strength of the tide there two hundred feet off.

Q. Up to Pier 6 how far off would you have to go? A. Sixty or seventy feet off there, at Pier 6.

By the Court:

Q. How far off at Pier 1? A. It ain't much difference between Pier 1 and Pier 2; might run off fifty more from Pier 1 than Pier 2; don't know much about it.

461 By Mr. McCarthy:

Q. Pier 1 is about how far from Pier 2? A. About two hundred feet.

Q. Where do you locate the place of collision? A. The barge struck us right off Pier 1; we had been going for some time back by the land—we weren't going ahead any I think.

Q. How far away do you think it was from the end of the pier? A. I don't know; I have looked at it several times since about the same place; we generally go around there 200 or 250 feet off.

Q. From the end of the pier? A. From the end of the pier? I testified before that it was further, but I never took any particular notice.

462 Q. Have you since taken particular notice? A. Yes, sir; I went around there a good many times pretty near the same place, and I may be sixty or seventy feet out of the way, it wasn't off shore as far as I testified the first time; if we had been two hundred yards off we wouldn't have got in slack water at all, and we were in slack water off Pier 1.

Q. Have you taken a view from the Wall Street Ferry across? A. Yes, sir.

Q. Of what points on the shore can you get an unobstructed view from the Wall Street Ferry? A. You can't see above the Central Ferry.

Q. Can you see that? A. We can just see the ferry. 463

Q. Can you see all of the ferry? A. Not all.

Q. How much can you see? A. A half or more may be.

Q. You are sure you can't see it all? A. I don't think I can see all of it; Roberts' Stores, where they say they started from, is a great deal farther up; we can't see Central Ferry from Roberts' Stores.

Q. Where did you first see the *Wolverton?* A. When I heard him blow the whistles.

Q. When the man blew the first whistles? A. I don't know; I only heard him blow two; I think it was the last, and I looked to see what was coming. 464

Q. What side of your boat did you look from? A. The starboard side.

Q. Whereabouts on your starboard side? A. The starboard engine room door.

Q. How far is that from the bow? A. I don't know; about amidships.

Q. You saw then, by looking out of your starboard engine room door, the *Wolverton* coming? A. Yes, sir.

Q. How far off did she seem to be? A. I should say 300 or 350 yards.

Q. How in the river? A. She was pretty well out—out towards the middle from what we were.

Q. What side of your boat was she on? A. On the starboard side; she couldn't be on any other side. 465

Q. You know she was on the starboard side? A. Yes, sir; else I couldn't see her.

Q. What part of the *Wolverton* did you see; how did she seem to be coming? A. Down across the river; I could see both sides of her bow—of the *Wolverton.*

Q. If she had kept right on that course where do you think she would have hit the Jersey shore? A. If she kept straight on, as the tide run, she would hit down at Bedloe's Island; the North River tide would set her down.

466 Q, She would hit below Communipaw Ferry? A. Yes, she couldn't pull up on that course.

Q. Captain Schultz said he was heading for a point just below Communipaw Ferry; is it your judgment when you saw the *Wolverton* that such was the course she was heading on? A. Yes, sir; she was heading out towards the Jersey shore, but he couldn't fetch where he was heading; the tide——

Q. Did you observe the barge behind her? A. Yes, sir; I saw that the barge was behind.

Q. How was that following her? A. The barge was coming pretty straight behind her; I think she was sagging down a little more than the tug; she looked that way.

467 Q. How does the tide set where you saw the *Wolverton* and barge; state if you know. A. I don't know much about the tide; it set pretty straight down there, I think.

Q. How fast did the *Wolverton* seem to be coming? A. She was coming pretty fast; she was coming with the tide.

Q. How far do you say it is, give us your best judgment, from Roberts' Stores to the new Barge Office; if you have no judgment don't answer? A. I should think it was three-quarters of a mile. I don't know.

Q. Have you ever had anything to do with the navigation of a tug? A. No, sir.

468 Q. Did you see the *Wolverton* when she changed her course? A. No, sir; I didn't see her when she changed her course, I don't think; I don't recollect.

CROSS-EXAMINED by Mr. Benedict:

Q. Do you remember how many boats you brought up from Port Johnson? A. I think we brought two up.

Q. Didn't you bring three? A. I don't think we did; no, sir; I don't know now, it has been so long ago; I know we had two, and we made one land before, and we may have left two in there.

Q. You also were examined as a witness before? 469
A. Yes, sir.

Q. And then you testified, did you not, that when you heard the whistles blowing you were about two hundred to two hundred and fifty yards away from the shore? A. I might have; it has been so long ago I don't know; two hundred or three hundred yards—I couldn't get exactly to it.

Q. Do you mean to change that now? A. No, I ain't changed it much; I said three hundred yards, I think. O, I suppose you were asking me about the distance apart of the tugs; yes, sir; I mean to change that because I don't think it was as far.

Q. When was your attention first called to the matter of whether that distance that you had given 470
was wrong? A. The first I knew was when this suit come on, then I took particular notice.

Q. When was your attention first called to the matter of your testimony being wrong on that point? A. Right away after we came from Philadelphia; I was going around there, and I looked and I knew we had the distance wrong; I have looked at it several times.

Q. It hasn't been called to your attention by anybody since? A. No, sir.

Q. Have you ever talked over with anybody about your testimony being wrong? A. I don't think I have.

Q. Have you never told Mr. McCarthy your testi- 471
mony was wrong? A. No, sir; I never told him it was wrong.

Q. How long had you been attached to the *Packer*? A. I don't recollect; about fifteen months, I guess.

Q. Where had she been running during that time? A. Different places—Port Johnson and Amboy; I don't recollect now.

Q. In the coal trade mostly, was she not—towing coal barges? A. Yes, sir.

Q. How many coal barges did she usually bring up? A. She used to bring great many more than she could sometimes.

472 Q. How many did she usually bring up? A. I don't know; from one to a dozen, may be, if we had them.

By the Court:

Q. Do you know how many she could bring against the strength of the ebb tide past Governor's Island? A. She could bring four, I suppose, with the boat wide open and carrying all the steam allowed; not four such ones as we had that day—four ordinary boats.

By Mr. Benedict:

473 Q. How much weight of coal could she carry and manage well against the strength of the ebb tide? A. Ordinary boats about two hundred and fifty tons —four boats.

Q. Four of them would be a thousand tons? A. Yes, sir; she could tow that, wide open.

Q. And have no difficulty? A. Yes, we wouldn't tow very fast, but could tow past Governor's Island; we couldn't tow a long distance; we couldn't carry that steam a long distance.

Q. How many miles an hour against the ebb tide? A. I don't think we ever towed that many a mile against the stream in ebb tide; we might tow half a mile an hour; I don't know.

474 Q. Do you know how fast you did tow those two barges against the ebb tide up to Pier 9? A. No, sir; I never timed it.

Mr. McCarthy:

Q. That assumes what I don't believe exists; that they were towing against the ebb tide.

The Witness: If the tide was not running very hard, we could tow against the tide.

Q. You don't know how fast you could tow going up to Pier 9? A. No, sir; I don't know how fast; I never timed it. I didn't expect we were going to have a collision.

Q. You haven't ever timed any of those boats, 475
have you, as to giving distances and speed, and yet you have given them, why not give this? A. I suppose we come up in slack water; if it hadn't got running down in the North River, we might tow three or four miles an hour.

Q. Do you mean to say the ebb tide was not running down when you went up to Pier 9? A. Not running strong, I think.

Q. How long were you at Pier 9? A. I couldn't tell you—might have been an hour.

Q. Have you any such memory? A. No, sir.

Q. Did you do anything there but land this barge? A. That is all we done.

Q. How long does that take ordinarily? A. Some- 476
times it takes an hour; we might have done it in fifteen minutes that day; I don't recollect.

Q. You had come down the North River, at a good deal more rapid rate, had you not? A. Yes, sir; came down the North River from Pier 9 faster.

Q. Did you get out of the ebb—North River ebb tide, at any time? A. When we came around the Battery in slack water there is no tide, only half tide.

Q. Where did you get out of it? A. It is all slack water coming around the Battery; I don't know as we got out.

Q. You were in your engine room? A. Yes, sir.

477

Q. Was your attention called as to where you were at all till you heard the whistles? A. I was looking out of the port side coming around the Battery, and when the whistles blew I looked out of the starboard door.

Q. Can you tell at all where you struck slack water—where your boat was when you struck slack water, if she did? A. I wasn't taking particular notice of slack water; it is all slack water around Battery—any one knows that.

Q. That depends upon how close you are in?

478 A. The slack water sets pretty well out in half tide.

Q. How far out? A. I couldn't say; about a hundred yards.

Q. You can't say whether your boat was in slack water or ebb tide as you came around the Battery? A. She wasn't in the strength of the ebb tide, and I don't suppose she was in the slackest water, but she was in slack water.

Q. Then as you came around the Battery you were coming at greater speed than one mile an hour? A. Yes, sir; we were not going very fast because we were not in a hurry; we were waiting for the tide to slack in the East River.

479 Q. Had you had any orders to go slow? A. No, sir; only my own orders—I know that myself.

Q. You were going under the ordinary bells, were you not? A. Under the ordinary bells; I run to suit myself.

By the Court:

Q. Did you reverse your engine? A. Yes, sir.

Q. How long before the collision? A. About half a minute; a very short time; I don't know exactly.

Q. Do you know how many revolutions you got before the collision? A. I guess she made about sixty-five or seventy revolutions before.

480

By Mr. McCarthy:

Q. After you reversed? A. Yes, sir; I think so.

By the Court:

Q. How many does she make in a minute in a direct action? A. She made about seventy—at that time I think—that is if she was open.

Q. Don't you remember? A. We were not open; she wasn't making over sixty, I don't think—the way we were going at the time of the collision.

Q. You think she made a minute's revolution

backward, do you? A. No, sir; she didn't make a minute, but she turned faster going backward; I had her wide open then. 481

By Mr. Benedict:

Q. Didn't your engine catch on the centre at that time? A. No, sir.

Q. Not at any time? A. No, sir; I ain't that kind of an engineer as has them on the centre.

Q. I understand that your attention was first called by hearing the whistles? A. Yes, sir; that is the first I saw the barge.

Q. You heard two whistles? A. Two.

Q. And only two? A. I don't know; I might have heard more before, but I don't recollect of hearing but two whistles. 482

Q. You might have heard a great many but don't remember of hearing but two? A. I don't remember a great many; if I had I would have looked out sooner.

Q. Do you know whether it was the first two or the second two? A. Must have been the second two; he never blew none afterwards.

Q. When you looked out you looked on the starboard side? A. Out of the starboard door.

Q. Why was it that you looked out of the starboard door? A. Because I knew he blew two whistles, and I knew which side to look out for anything coming. 483

Q. You saw the *Wolverton?* A. Yes, sir.

Q. Did you see the barge at that time? A. Yes, sir.

Q. Her barge, I mean? A. That is the barge I mean too.

Q. When you saw the barge did you look right over the *Wolverton* to see the barge? A. No, sir; I see the barge astern of her.

Q. You looked to the stern of the *Wolverton* in order to see the barge? A. Yes, sir; I looked at the stern; I didn't see her at the bow.

Q. You looked to the right of the *Wolverton* to see

484 the barge? A. Yes, sir; under her stern—to the right; I couldn't see her on the starboard side; I could see her off the *Wolverton*'s port side, behind the *Wolverton*.

Mr. Wyllys Benedict:

Q. You looked on your right-hand side to see her? A. Yes, sir; I couldn't see her on any other side the way she was coming.

Q. Did you see the whole of the barge? A. No, sir; I couldn't see both sides of her.

Q. I mean to say, was any part of her obscured by the tugboat that was towing her? A. I don't think there was; I don't know.

485

By Mr. Benedict:

Q. Could you see the whole of her port side? A. I could see her stern.

Q. You say you think she was then three hundred or three hundred and fifty yards off? A. Yes, sir.

Q. You don't want to change that estimate of distance? A. No; I think that is about the distance.

Q. How far did she come ahead while you stood looking at her? A. I don't know; I didn't stand long because he rung the bells right away.

Q. How far do you think she came ahead while you stood looking at her? A. She might have come
486 the length of her, the barge and the hawser—about three hundred and fifty feet I guess.

By Mr. McCarthy:

Q. She might? A. Yes, sir; I don't know; she was coming pretty fast with the tide with her.

By Mr. Benedict:

Q. How far do you think she was off when you got the two bells? A. Oh, I understand your question now; your question is how far off she was when I got the bells?

Q. Yes; you stood looking at her till you got the bells? A. I just seen her and he rung the bells; she couldn't be a great ways—may be twenty-five or thirty yards when I first saw him—when he rung the bells. 487

Q. You think at the time when the bells were rung she was over three hundred yards away? A. She was nearer than that—may be fifty to three hundred; she had come ahead quite some.

Q. While you were looking at her, before you got the bells? A. I didn't have time to look at her much; I first saw her when he rung the bells.

By the Court:

Q. Did you think there would be a collision? A. If he kept his course. 488

Q. Who? A. The pilot on the other tug—the *Wolverton*; we couldn't get outside of her and couldn't get inside, if he didn't go under our stern.

By Mr. Benedict:

Q. When you got your bells you went to your engine? A. Yes, sir.

Q. Did you look out again before the collision? A. No, sir.

Q. What bells did you get? A. Four bells.

Q. How did they come? A. About as quick as they could ring them, I think.

Q. Did you answer them as quick as you could? A. Yes, sir. 489

Q. How many turns do you say you got back before the collision? A. About sixty-five or seventy I should think; I don't know for certain; we had all our way stopped.

Redirect by Mr. McCarthy:

Q. Did you hear any shouting from the *Atlanta* just before the collision? A. No, sir; not that I recollect.

Q. The collision was such as to thrust the bow of the Cross Creek barge into the side of the *Atlanta;*

490 did you back out from her? A. We backed and she swung off shore.

Q. After you ran into her? A. After we ran into her we stopped.

Q. The bow of the Cross Creek barge crushed into the side of the *Atlanta* more or less; did you have to back out from her? A. No, sir; I don't think we did; I couldn't see it at that time—I was at the engine.

Q. You don't know? A. No.

Q. Do you know whether or not there might have been bells rung at that time? A. On what—my boat.

Q. Yes. A. No, sir; there might have been bells
491 rung, but I don't recollect now; I think we stopped as soon as we struck.

RECROSS by Mr. Benedict:

Q. Do you know how your boat was heading at the time of the collision, I mean with reference to the line of the piers? A. Yes, sir; she was heading pretty near straight along by the piers, up the East River.

Q. The backing of the engines would swing her off from the piers, wouldn't it? A. Yes, sir; it would swing her a little.

Q. It would swing her pretty fast, wouldn't it? A. No, sir; not much in slack water; it would be the
492 tide.

Q. You think she backed pretty straight? A. Yes, sir; she did on the start; she swung more afterwards; we hadn't been backing long enough to swing her much.

Q. I understand you to say that you thought you had got her way stopped in the water? A. Our way was stopped, yes—when the barge struck our barge.

Q. How long do you make it between the time that you heard these two whistles and the time you got your bells? A. I couldn't say; it was a very short time though, only a few seconds; I just had time to look out and see.

Q. When you were examined before you said it was about a minute, didn't you? A. I know it was not a minute now, and any one else knows it was not. 493

Q. You said then it was about a minute, didn't you? A. I don't recollect what I said then; if I did I was mistaken because it couldn't have been a minute.

Q. You understood, did you not, that the *Wolverton* and the *Atlanta* were coming across the tide? A. Yes, sir; were coming across the tide—quartering the tide.

Q. Were you the engineer or assistant, or what were you? A. No, sir; I was the engineer.

Q. Didn't she have another engineer? A. No, sir.

Q. Was there anybody else in the engine room but you? A. No, sir. 494

Q. Had you had charge of the engine all the way from Port Johnson? A. I did; yes, sir.

By Mr. McCarthy:

Q. Do you think the *Packer* would have been able to have taken four loaded barges up the East River against the full set of that tide? A. No, sir; she couldn't take two of them—not up the East River.

By Mr. Benedict:

Q. She could take this one without any difficulty? A. Yes, sir; we could take that one, but we were not in a hurry to take her; we were waiting for slack water. 495

JAMES SHIELDS, being duly sworn and examined as a witness for the claimants, testifies:

By Mr. McCarthy:

Q. You were on the *Packer* at the time of the collision? A. Yes, sir.

Q. And what was your duty on the *Packer*? A. Deckhand.

Q. Did you observe how your barge and tug went as you went around the Battery? A. Yes, sir.

496 Q. How far away do you think you went from the new Barge Office? A. About two hundred and fifty feet.

Q. Is that your best judgment? A. Yes, sir.

Q. How far away do you think you went from the end of Pier 1? A. It was about the same.

Q. Do you think you were in slack water or not? A. Yes, sir.

Q. Did you see the *Wolverton* before the collision? A. Yes, sir.

Q. How far off was she when you saw her? A. About four or five hundred yards.

Q. Where were you when you saw her? A. Opposite the Barge Office.

497 Q. Where were you standing? A. I was up in the pilot-house.

Q. Did you see the *Wolverton* before or after the last whistles were blown? A. I only heard two.

Q. Was it before or after those? A. Before.

Q. How long before? A. About half a miuute.

Q. A short time was it? A. Yes, sir.

Q. You think she was four or five hundred yards away? A. Yes, sir.

Q. Whereabouts in the river was she? A. About in the middle of the river.

Q. How did she seem to be heading? A. She seemed to be heading right towards our bow.

Q. How did you see her—which way was she from
498 your tug—on your right-hand side or left-hand side? A. On our right-hand side.

Q. That is, was she or not, on your starboard side? A. She was on our starboard bow.

Q. Did she seem to be coming pretty fast? A. Yes, sir; pretty fast.

Q. Where do you put the place of the collision? A. I put it right off the South Ferry.

Q. How far out? A. About two hundred and fifty feet.

Q. How was your tug, the *Packer*, going just before the collision—which way was she heading? A. Kind of in all the time.

Q. Inshore? A. Yes, sir. 499

Q. Did you see whether Stephen starboarded his wheel, or not, at the time you blew? A. I don't know.

Q. You didn't pay much attention to that? A. No, sir.

Q. Do you know much about the navigation of steamboats? A. I don't know much about that.

By the Court:

Q. How were you employed on the boat? A. As deckhand.

CROSS-EXAMINED by Mr. Benedict:

500

Q. When did you go into the pilot-house? A. About Castle Garden.

Q. Did you have hold of the wheel? A. No, sir.

Q. Did you see the pilot when he blew the whistle? A. Yes, sir.

Q. How does he blow it—with a pull, so (illustrating)? A. Yes, sir.

Q. You only saw him pull for two whistles? A. Yes, sir.

Q. That is all? A. Yes, sir; I don't know if he blowed any more; I only heard two.

Q. You say you had seen the *Wolverton* before he blew the two whistles? A. Yes, sir.

Q. Did you say anything to him about it? A. No, sir. 501

Q. Nor he to you? A. No, sir.

Q. You went into the pilot house about off Castle Garden? A. Yes, sir.

Q. How soon after that did you see the *Wolverton?* A. I seen her off the Barge Office.

Q. When you were off the Barge Office, do you mean? A. Yes, sir.

Q. When was it that the two whistles blew? A. Right then.

Q. You mean that you saw her at the same time the two whistles blew? A. Yes, sir.

502 Q. I thought you said you saw her half a minute before? A. No, sir; I did not.

Q. Then it was the whistles that called your attention to her? A. Yes, sir.

Q. You had not seen her until he blew the whistles? A. No, sir.

Q. Then you saw the *Wolverton*; did you see she had a barge in tow? A. Yes, sir.

Q. She was then off your starboard bow? A. Yes, sir.

Q. Did you have to look over the *Wolverton* in order to see the barge, or could you see her looking to one side? A. To one side.

Q. Which side? A. On her port side I saw her.

503 Q. That is to your right? A. Yes, sir.

Q. How far away do you think she was when the whistles blew? A. I should judge about four or five hundred yards.

Q. Did you hear him when he rung the bells to stop the engine? A. Yes, sir.

Q. How far away was the *Wolverton* then? A. She was about—I didn't pay no attention then.

Q. You didn't pay any attention to her when he stopped? A. No, sir; I was downstairs then.

Q. When he rung the bells to stop the engine? A. Yes, sir.

Q. Did you leave the pilot-house then after he blew the whistles? A. Yes, sir.

504 Q. How soon after he blew the whistles did you leave? A. Right away.

Q. Where did you go? A. I went behind her stern.

Q. Your stern? A. Yes, sir; around the house.

Q. Were you there when the bells struck? A. Yes, sir.

Q. What were you doing? A. I wasn't doing nothing.

Q. Did the bells strike as soon as you got there, or a little after? A. They were striking afterwards.

Q. They struck after you got there? A. Yes, sir.

Q. Did I understand you to say that the *Packer*

was kind of heading in shore before the collision? 505
A. In shore; yes, sir.

Q. But you didn't see him change his wheel? A. No, sir; I did not.

Q. What was it made you say she was going in shore? A. I could tell.

Q. Up to the time when you left the pilot-house had you seen any change in the *Wolverton's* course? A. No, sir.

STEPHEN SLOVER recalled.

By Mr. McCarthy:

Q. Did you hear any cry from the Cross Creek barge? A. No, sir. 506

Q. Do you know whether or not you rang your bells just after the Cross Creek barge ran into the *Atlanta*? A. I don't remember doing that.

Q. You had to back out of her, didn't you? A. Yes, sir.

Q. And you couldn't have done that without ringing bells, could you? A. I don't know how many I rung.

Q. In order to back out you would have to ring, wouldn't you? A. Certainly.

CROSS-EXAMINED by Mr. Benedict:

Q. What bells would you have to ring in order to back out? A. Two. 507

Q. That is, two backing bells? A. Yes, sir.

Q. Then your engine was not backing before? A. I had been backing; yes, sir.

Q. And had you stopped it? A. I think I had; yes, sir.

Q. Do you remember anything about that? A. No, sir.

Q. What on earth did you stop backing for? A. We had both come to a standstill.

Q. My question is, what did you stop backing your engine for? A. I can't tell you now.

508 Q. You can't say that you did, can you? A. I don't remember.

Q. Do you remember that you would have had to ring two bells in order to get free from the *Atlanta*? A, Yes, sir; if I had stopped the engine before I would.

Q. I understand that; that is what my question is, whether you do remember that you would have had to ring those two bells in order to back out? A. I would have to.

JOHN SCULLY, being duly sworn and examined as a witness for the claimant, testifies:

509 By Mr. McCarthy:

Q. Have you made an estimate of the distances between the new Barge Office and Pier 1, and between Pier 1 and Pier 2?

Objected to. Question allowed.

A. Yes, sir.

Q. I want you to give us your best judgment of what the distance is from the new Barge Office to Pier 1?

Mr. Benedict: That is a matter susceptible of measurement?

Question allowed.

510 A. I should think about one hundred and fifty feet.

Q. And from Pier 1 to Pier 2 is how far? A. About 225 feet; somewheres thereabouts.

Q. Have you been to the Wall Street Ferry to see if you can get an unobstructed view of the Barge Office from the shore? A. Yes, sir.

Q. How far up can you see unobstructed? A. The upper shed of Communipaw Ferry.

Q. You can see the whole of the ferry? A. Yes, sir.

Q. That is a perfectly clear view? A. Yes, sir.

By the Court:

511

Q. From what point? A. From Wall Street Ferry.

Q. You can see past the Battery to the upper shed of Communipaw Ferry? A. Yes, sir.

By Mr. McCarthy:

Q. Would a straight horizontal line drawn from the Wall Street Ferry slip to Communipaw Ferry go below the Battery? A. Yes, sir; by a considerable distance.

Q. How many hundred feet? A. I should judge seven or eight hundred feet, if not more.

ELI A. KELLAN, being duly sworn and examined as a witness for the claimants, testifies:

512

By Mr. McCarthy:

Q. Where do you reside, and what is your occupation? A. I reside in South Amboy; steamboating.

Q. Are you a licensed pilot? A. Yes, sir.

Q. Did you have anything to do with the *Packer* in the fall of 1880, at the time of the collision between the *Atlanta* and the Cross Creek barge No. 5? A. I was captain of her.

Q. Were you on board at that time? A. Yes, sir.

Q. Do you remember where you came from that day? A. Came from Port Johnson.

513

Q. Do you remember how many boats you had in tow? A. We had two or three; I don't remember whether it was three or two.

Q. And how many did you leave at Pier No. 9? A. We left one there, and if we had three we left two there.

Q. As you came away from Pier No. 9 and went around the Battery, did you observe how far you were from the Battery, and if so, state how far? A. I didn't see that.

Q. Where were you? A. I was in the room.

Q. What is the custom in regard to going around

514 the Battery with loaded tows on an ebb tide, as it was then? A. We always keep close, to get in the eddy tide.

Q. In going around up the East River? A. Yes, sir.

Q. You had gone to your room? A. Yes, sir.

Q. It was your watch off? A. Yes, sir.

Q. What do you call close to the Battery? A. If it is on the ebb tide we run about two or three hundred feet away.

Q. From the piers? A. Yes, sir.

Q. Does that give you the benefit of the slack water? A. Yes, sir.

Q. Suppose you were to go out six or seven hun-
515 dred feet? A. We would get the ebb tide out of the East River as we got around.

Q. Would you get the strength of it or not? A. That depends on the stage of the tide.

Q. Take it at its highest—half ebb—when it is running from four to five knots an hour? A. If we were out seven or eight hundred feet I suppose we would get pretty strong ebb tide.

Q. When did you first come out of your room? A. After I heard bells rung to go back.

Q. Not till you heard the bells rung? A. No, sir.

Q. What part of the tug did you get on then? A. I went out on the port side and went to the bow.

Q. You did it immediately on hearing the bells?
516 A. Yes, sir.

Q. Where was your tug then? A. My tug was near Pier 1.

Q. How far off do you think she was? A. I don't think she was more than three hundred feet away.

Q. Where did you see the *Wolverton?* A. She was across our bow then.

Q. How far away from you was she? A. I couldn't tell exactly; she wasn't more than a length, I don't think.

Q. Hadn't you seen her before that? A. No, sir.

Q. Where did she seem to be heading for? A.

She was heading then for pretty near into the ferry slip. 517

By the Court:

Q. What ferry slip? A. South Ferry.

By Mr. McCarthy:

Q. And how was her barge? A. The barge was swinging down with the ebb tide.

Q. Yawing out from her line? A. Yes, sir.

Q. How fast were you going; had you been going up till that time? A. I don't know; I don't think we ought to go more than——

Q. If you don't know don't say how fast; were you going up till that time; state, if you know, and if you don't, let it go? A. We were not going more than two miles. 518

Q. Did you know anything about it, or is it mere guesswork? A. That is all.

Q. How was her barge, the *Atlanta*, which side of you, port or starboard side? A. Starboard side.

Q. And the *Wolverton*, according to your judgment, was right under your bow? A. Yes, sir.

Q. About her length ahead of you? A. Yes, sir.

Q. Did you hear the whistles blown? A. Yes, sir.

Q. How long before that had the whistles been blown? A. Only a short while.

Q. Do you know whereabouts your tug was when the whistles were blown? A. No, sir. 519

By the Court:

Q. Were you below when you heard the whistles? A. Yes, sir; in the room.

Q. Which room was it? A. A room aft on the port side.

By Mr. McCarthy:

Q. Had you been in bed? A. Lying on the bed.

Q. Had you been asleep? A. No, sir; I hadn't got asleep, I don't think.

520 Q. You didn't see any change, of course, then in the *Wolverton?* A. No, sir.

CROSS-EXAMINED by Mr. Benedict:

Q. How long had you been captain of the *Packer* at this time? A. Two or three years.

Q. How large is the *Packer*—what is her cylinder? A. Twenty two inches.

Q. And how much have you towed with her against the tide? A. Which tide?

Q. Any tide? A. Well, on some stages of the tide she would tow more than she would on others.

Q. How much have you towed with her against the strength of the ebb tide? A. In the East River?

521 Q. Take it in the East River, yes. A. On the strength of the tide in the East River, she would hardly tow two barges like she had.

Q. You don't answer my question. How much weight—you have towed with her against the strength of the ebb tide, haven't you? A. How many tons?

Q. Yes. A. I don't remember; I don't think she would tow more than six or seven hundred tons.

By Mr. McCarthy:

Q. How fast would she go at that time? A. She would just be about able to go.

522 By Mr. Benedict:

Q. You were examiued once before in reference to this matter, were you not? A. Yes, sir.

Q. Were you not asked: "What tonnage have you yourself known the *Packer* to haul against a strong ebb tide?" And didn't you answer: "We have taken tows from South Amboy to New York of over four thousand tons, with the *E. A. Packer?*" A. Yes, sir.

Q. And further, did you not say: "We have to stem the ebb tide in the Kills, and have to stem the

first of the ebb tide in New York Bay?" A. Yes, 523
sir.

Q. When you have towed that amount of tonnage at what rate have you been able to tow it against the ebb tide? A. Barely able to move on the first of the tide.

Q. You had to get ahead some way or else you wouldn't get there; I ask you how fast were you able to move that four thousand tons against the ebb tide? A. If the tide was running we wouldn't go at all—we would go astern.

Q. How fast were you able to do it? A. Not when the tide was running, we never done it.

Q. You have said that you took the tow against the first of the ebb tide in New York Bay, and had 524
taken four thousand tons; will you please tell me the rate of speed at which you towed? A. The first of the ebb tide in New York bay, when we go there with those tows, the tide isn't running any at all; it is about stationary.

Q. I wish you would answer the question I put to you. At what rate of speed did you move? A. We wouldn't go more than a mile.

Q. A mile an hour? A. Yes, sir.

Q. On this day were you in charge of the navigation coming up to Pier 9? A. No, sir; not all the way.

Q. Were you during any part of the time? A. I think I was part of the way; I won't say positively 525
about that.

Q. Are you able to tell how fast you towed up the North River to Pier 9? A. No, sir.

Q. How fast would you be able to tow four hundeed tons in slack water? A. I suppose about six miles.

By Mr. McCarthy:

Q. If you had your full head of steam on, is that it? A. Yes, sir.

526 By Mr. Benedict:

Q. I understand you to say, on this day you were in your room when you head the bells ring? A. Yes, sir.

Q. You had not been looking out before that? A. No, sir.

Q. So that you don't know anything with reference to the navigation before that time? A. I do not.

Q. What bells did you hear? A. I heard four.

Q. You hadn't heard any whistles? A. Yes.

Q. You had heard a whistle? A. Yes, sir.

Q. I thought the first you heard was the bells? A. I heard two whistles.

527 Q. Only one set of two whistles? A. That is all I heard; yes, sir.

Q. You didn't start on hearing the two whistles? A. No, sir.

A. How long a time was there between the whistles and the bells? A. Shortly afterwards.

Q. How long? A. I couldn't tell how long.

Q. A minute? A. No; I don't think it was that long.

Q. Did you start at once as soon as you heard the bells? A. Yes, sir.

Q. Were you undressed? A. No, sir.

Q. You didn't have to put anything on in order to come out? A. Only put my shoes on.

528 Q. Did you stop to put your shoes on? A. Slipped them on; yes, sir.

Q. Then you came out of the door on the port side? A. Yes, sir.

Q. How far forward did you go? A. Very near to the bow.

Q. How far is it that from your door where you came out? A. I suppose about forty feet.

Q. So that you walked about forty feet? A. Yes, sir.

Q. And when you got there the *Wolverton* was already across your bow? A. Yes, sir.

Q. Please specify more particularly where she was? 529
A. She was about, I suppose, a hundred feet from us, going across, our bow.

Q. Was she ahead of your boat, or had she got by on your port side at the time? A. Going right across our bow.

Q. She had not got across? A. No.

Q. Was she a hundred feet away from you? A. I think it was about that.

Q. How was her course compared with yours, was it a right angle course? A. She was going directly across our bow.

Q. At right angles? A. Yes, sir.

Q. Did you look to see how your bow was heading? A. I didn't notice that. 530

Q. Do I understand you that you thought the *Wolverton* was heading right in the South Ferry slip? A. That is what I thought; yes, sir.

Q. How far out do you think you were from the edge of the ferry slip? A. I don't think we was more than three hundred feet.

Q. How far do you think the *Wolverton* was from the line of the ferry slip at the time of the collision? A. She must have been pretty close to her.

Q. How close? A. I don't know; I didn't look.

By Mr. McCarthy:

Q. At that time she had already got inside of you 531
—at the time of the collision? A. Yes, sir.

By Mr. Benedict:

Q. You were examined also in reference to the distance, were you not, when you were examined before? A. Yes, sir.

Q. Didn't you testify then that you thought the collision took place from one hundred and fifty to two hundred yards from the shore? A. Yes, sir.

Q. Do you think so now? A. No, sir.

Q. Why have you changed it? A. Well, I went

532 there and took the boat there, and put her in the position that I thought that we were—in the distance that we were in—the distance that we were off—and I come to the conclusion that we were not that far off.

Q. How far do you think you were? A. About three hundred feet; not more than that.

By the Court:

Q. That is from Pier 1? A. Yes, sir.

By Mr. Benedict:

Q. You testified before that you had three boats—brought three boats up from Port Johnson. A. Well,
533 I may; we may have had three; I won't say positive now whether we had three or two.

Redirect by Mr. McCarthy:

Q. Suppose you put the *Packer* and that barge with 450 tons of coal on her out in the East River when the tide is running at the strongest ebb, how fast could you go? A. It would take us a day to go to Sixty-first street, where we were bound.

Q. How fast could you go past the land with the tide running from four and a half to five knots an hour? A. I don't know; we never get out in the strength of the tide very often; sometimes I have seen her go astern with a barge like that in the East
534 River, and couldn't get ahead at all; go astern often times.

David Cox, being duly sworn and examined as a witness for the claimants, testifies:

By Mr. McCarthy:

Q. What is your business? A. Tugboat business in New York harbor and around.

Q. How long has that been your business? A. About thirty years.

Q. You are the owner of tugs? A. Yes, sir.

Q. Do you know the tug *E. A. Packer*? A. Yes, sir.

Q. What is the custom, if there is any, in regard 535
to tugboats having tows alongside going down from the piers in the North River around the Battery when the tide is running strong ebb down the East River?

Mr. Benedict: I object; I suppose the law fixes this rule.

Question allowed.

Q. Where do you consider the beginning of the East River? A. Pier 1, at Staten Island Ferry; we calculate it commences then?

Q. Repeated. What is the custom, if there is any, in regard to tugboats having tows alongside going down from the piers on the North River 536
around the Battery when the tide is running strong ebb down the East River? A. The fact is, as long as I have been around New York, and which is now going on to fifty-five years, the rule has been invariable for to go around the Battery, Pier 1, North River, as close as we can with a tow always, and keep the shore as close as we could do it; to swing enough at Pier 1 or Staten Island Ferry for to get our boat head up, so as when we struck the tide we wouldn't swing off.

Q. What is your evidence, your testimony, in regard to the eddy or slack water off the new Barge Office when the tide is running strong ebb? A. On the first of the tide to run close along the piers— 537
close.

By the Court:

Q. The ebb in the East River? A. Yes, sir; and as the tide ebbs—for instance, a quarter tide—it will go off, and when it gets half tide on the East River it will go quite a ways up.

Q. How far? A. It will go four or five hundred feet at that time off the Barge Office.

Q. Slack water? A. Yes, sir.

Q. Is that the case opposite the new Barge Office?

538 A. Yes, sir; it is more so opposite the new Barge Office.

Q. How is it opposite Pier 1? A. The slack water narrows in off the dock as you get up towards Pier 1.

Q. Pier 2 extends out further than the Barge Office? A. Yes, sir; Pier 1 has been cut off a little, and Pier 2 now goes out further than Pier 1.

Q. Take such a tug as the *Packer*, put alongside of her on her port side a barge loaded with 425 or 450 tons of coal, nothing on her starboard side, you are going around the Battery; what is the tendency, what effect does that barge have on her port side? A. To keep her towards the Barge Office, Pier 1—
539 towards the Battery.

Q. In your opinion, how would you hold your wheel when you were going around with such a barge on your port side? A. I would hold it so as to keep the vessel steady and pull it to starboard a little all the time, if there was nothing inside of me.

Q. Suppose in going around the Battery, two hundred or three hundred feet away you saw a tug coming down and across the river, the tide being half ebb, say, from a point where Roberts' Stores are, and you saw her in the middle of the river or thereabouts, and she had her tow on a hawser line a hundred feet in length, what course
540 would you pursue? A. I should certainly keep along shore as close as I could.

Q. You would go inside of her? A. Yes, sir.

Q. Suppose you saw her in that position when she was six or seven hundred yards off with this tow behind her, as I have said, a hundred feet or more and the tow itself was a hundred feet long, would you deem it safe or prudent to attempt to go to the right and around her? A. No, sir; I would not.

Q. Why not? A. Because she has no right to go in across to the shore anywhere below Pier 7; she ought not to; she ought to keep out.

Q. Why? A. Because to go around the Battery

you keep in the ebb tide and go clear of everything, 541
and she goes down, and when she strikes the slack water below the Battery the boat will swing; there is no man, without he has his helm hard-a-starboard, can go around there and strike it with a propeller or anything that is going anyways through the water, can't strike that slack water without his boat will swing.

Q. His tow? A. His boat will first swing, and then if she has a tow behind when she strikes she will swing, and they can't steady the boat; there is no question; the law is against our rules of navigation around here; there is no law in this world ever can be made, in my opinion, to regulate the towing or sailing around the Harbor of New York; the law, 542
the way I understand it, is made by men that don't understand it, and I have been around this harbor for fifty odd years; I sailed out of Whitehall Slip before we had a ferry there, and I know all about the tides there, and no way that a man should come down the East River with a tow, either alongside or with a hawser, but she would sweep it; he should keep away from the piers—keep away from the piers if he was to run safe.

Q. Suppose for any reason that tug, coming across the river on such a tide, got within two hundred feet of you, would there be any difficulty of her then starboarding her wheel and going off to the right? A. I think not. 543

Q. There is space enough? A. When she was heading parallel across, if she was two hundred feet to our right at the time, she, in my opinion, had plenty of time to swing—plenty of time.

By the Court:

Q. The question is: If the descending tug got within two hundred feet of you—but that must have reference to the relative positions of the two—how far out each is in the river? A. It would depend whether you are heading up the East River and this barge coming this way (illustrating); if she was go-

544 ing that way two hundred feet, she couldn't swing; but if we were heading that way, then she could swing.

Q. Then your answer is based on what assumption in regard to the position of the descending tug? A. If she was coming—for instance, we are heading up the East River E. by N., and have got around the pier——

By Mr. McCarthy:

Q. You are opposite South Ferry Slip? A. It would hardly do; you would have to be heading most east there; but if you got above Pier 4 we should then head E. by N. about, and if she was com-
545 ing from Brooklyn and on this course two hundred feet, she couldn't swing, because if she did swing, she would swing the barge; if she was two hundred feet this way and heading that way, she had plenty of room.

By the Court:

Q. That would be so without any change of course? A. No, sir; because if she kept on, when this tug was going pretty fast, she might strike it there (illustrating).

By Mr. McCarthy:

546 Q. Take this position: One of the tugs is heading up so as to get into the East River and making in for the New York shore somewhere; the other tug is heading in such a course as would bring her six or seven hundred feet below the Battery, and for a point on the New Jersey shore below Communipaw Ferry; suppose in that position, when heading that way, they got within two hundred feet of each other? A. If she was heading down that way, I think she would clear that way by swinging.

Q. She says she was heading in such a way as to go seven hundred feet from the new Barge Office?

A. I don't think she could ever strike the *Packer* 547
the way they state she was.

Q. Suppose instead of starboarding her wheels she ports her wheel so she throws her tug up five points into the New York shore? A. Without she was to the eastward of the tug, that is, going up quite a good ways, she could not get across her bow if she was that distance off from the tug that was going up the East River; it would make no difference about her swinging without she was higher up.

CROSS-EXAMINED by Mr. Benedict:

Q. This question that was put to you about supposing you saw a tug coming down in the middle of the river and she had a tow, when you said you 548
should go inside of her, how did you understand the two vessels to bear from each other? A. I understood that one was steering down partially and part for the piers.

Q. You mean the one from Brooklyn was heading for the piers? A. Yes, sir.

Q. And how did you understand the other was heading? A. Heading up around the piers; about east, I think, or east by north.

Q. Which bow did you understand the one heading up the river had the other boat on? A. On the starboard bow.

Q. Which bow did you understand that the tug coming from Brooklyn had the other boat on? A. I 549
have heard none of the evidence; the position of the boats—she must have been on the starboard side; they must have thought she was on the starboard side.

Q. Of the tug coming down? A. Yes, sir.

Q. Supposing instead of that, she was on the port side of the tug coming down, what then? A. I don't see how they could get that way.

Q. Never mind how it could be; I am asking whether in that case you consider the navigation to be the same as if she had her on the starboard side? A. No, sir; certainly.

550 Q. The navigation would be different for the two cases? A. Yes, sir; because the boat then that is coming down would be inside of her.

By Mr McCarthy:

Q. What? A. She must be inside of her to be on her port bow.

Q. He doesn't say each had the other on the port bow? A. I am rather mixed on that.

By Mr. Benedict:

Q. I say, suppose the case of the tug coming into the East River and having the other on the star-
551 board bow and the tug going down has the other on her port bow; in that case, would you think that it would be proper navigation for the tug coming up to sheer inside of the tug coming down? A. That would depend on where that boat was that was coming into the East River. You can go abreast the Battery three hundred feet or four hundred feet, when you are half way from the Battery to the Revenue Office, and if a boat starts from Roberts' Stores you can see her; then I have no doubt in my mind but what the *Packer* had the other boat on her port bow, but as she goes around the Battery and gets by the Barge Office she hauls up—they always haul up and go to keep in the slack water as long as they can, because, if I was on
552 the boat myself, I wouldn't think that that boat coming from Brooklyn would undertake for to get inside of me under no consideration whatever; that would be my view of it.

Q. Just pay attention to the question put to you and please answer it, and that only (repeated): Suppose the case of the tug coming into the East River and having the other on the starboard bow, and the tug going down has the other on her port bow; in that case, would you think that it would be proper navigation for the tug coming up to sheer inside of the tug coming down? A. I answer just as I did before; if that boat was going by the Bat-

tery, by the Revenue Office, and the other was coming from Roberts' Stores, she would have that Roberts' Stores' boat on her port bow for a certain time, but very little, and when she would get around Pier 1 she would have her on her starboard bow. 553

By the Court:

Q. The question is as to proper navigation; would it be proper navigation for the tug coming up to sheer inside of the tug coming down? A. Not if they had, as my friend says, if the boat coming down had the one going up on her port bow, with the exception that she was at a certain position; that is the idea; if she was around at Pier 1 or Pier 4, and then she had her on her port bow, then it wouldn't have been policy for her to sheer in, but where she is coming around the Battery she couldn't help but have her on her port bow for a certain distance. 554

Q. Which couldn't help it? A. The *Packer*.

Q. The question is, if she has the other boat on the starboard bow? A. Certainly; then I should certainly keep the *Packer* to the port, and keep her along there and let the other boat go the other side.

By Mr. Benedict:

Q. Do you understand what the rules require where vessels are crossing that way? A. Yes, sir.

Q. Don't they require that the vessel on the starboard hand shall keep out of the way and the other keep her course? A. Yes, sir; that is the law, but in this position you can't do that thing; that is the question. 555

Q. Now, you say, in that position it can't be done; will you please to tell me why it can't be done? A. My reason for it is that the vessel coming down should keep out; that is my reason; I can't give you any other.

Q. That doesn't answer my question; you say it can't be done; why can't it be done? A. Because

556 in the position it can't be done without there is a collision.

Q. Why not? A. Because they can't do it—a man can't do it; that is the only reason I can give you; if you give me the map around there, I can explain to the Judge all about it; I don't pretend to be infallible, but I do pretend to say, and I have said it a great many times before in Court, that it puzzles the best navigator in this world to answer the questions that is asked.

Q. I repeat my question: What is there to prevent—why couldn't the vessel in that case go under the stern of the other? A. It depends on circumstances; if there is room enough to do it you can
557 do it.

Q. Now stop right there; if there is room enough it can be done, you say? A. Yes, sir.

Q. It all depends, then, does it not, on the distance the vessels are apart when they take their manœuvres? A. Yes, sir.

Q. You have never navigated the *Packer*, have you? A. No, sir.

Q. Do you know her, as to her power, &c.? A. I know by the size of the engine and about what she should do by my own boats.

Q. What weight of a tow ought she to be able to handle well? A. In there she ought to be able to handle four boats very conveniently, with two hun-
558 dred and fifty or three hundred tons in each one.

Q. That is a thousand? A. No, sir; not a thousand tons.

Q. How much ought she to be able to handle well? A. She can handle about four boats with two hundred and fifty tons each.

Q. Well, that is a thousand tons? A. Yes, sir; and then it will make a great deal of difference what kind of boats you have.

Q. Do you know this Cross Creek barge, No. 5? A. Yes, sir.

Q. How many of those ought she to be able to

handle well? A. Two would be all I would allow her if she was my boat—to go in the East River. 559

Q. But those she ought to be able to handle and handle well? A. Yes, sir; I think so.

Q. How long would it take her with those to swing herself and her tow so as to change her position sixty feet out into the river? A. Well, it wouldn't take more than three or four minutes, without you had to right angle or something like that, but to change position it wouldn't take a great while if she was heading the tide.

Q. And if she was in the slack tide it would take her still less, wouldn't it? A. No, sir; still longer.

Q. The moment she came to the edge of the tide that would carry her right straight off, wouldn't it? A. Yes, sir, if she swung around; that would depend on how she struck that tide; if she struck it what we call head on after she got into it she could sheer quicker, but if she struck it sidewise, on her port bow for instance, going around the East River she would sheer then very quickly. 560

Q. All she has got to do is to put her nose in the ebb tide and her bow will go off, as matter of course? A. She gets right in it as she gets to Pier 3.

Q. If a pilot is coming up the river, coming around from Castle Garden and he sees another boat coming down in such a way as to strike that eddy tide, slack water, he would know, would he not, that the moment he struck that slack water his head would go off to starboard? A. He should; he ought to know that. 561

Q. Then the question of which way he is to go from that vessel all depends upon how far away the two vessels are when either of them strikes that eddy tide, isn't that so? A. Yes, sir.

Q. And as to that, why of course neither you nor any other man can tell exactly what that distance will be, I suppose? A. We can come pretty near it; it is a hard matter to get at exact distances on water.

Q. I understand you to say that the law is against

562 the rules of towing? A. I must say it is in the East River.

Q. When you testified in reference to this matter in answer to Mr. McCarthy, did you understand that you were giving testimony according to rules of towing or according to rules of law? A. According to rules of towing around the Battery.

Q. Not according to law? A. As you stated it, there in the middle of the river it would not be according to law no way; but I would like to suggest there is no man alive can go according to law around the Battery with a tow. When we have a heavy tow we do the best we can going around there and through the East River.

563

By the Court:

Q. Ordinarily at the mid ebb tide in the East River is there any difference between the strength of the East River ebb and the North River ebb? A. Yes, sir; a good deal.

Q. What is the difference? A. It is all of a mile or a mile and a half faster.

Q. At mid ebb the East River ebb is a mile or a mile and a half faster than the North River ebb? A. Yes, sir.

By Mr. Benedict:

564 Q. How fast do you call the half ebb? A. About that time I should think about three and a half miles, and sometimes it runs four and four and a half; it depends on the weather we have.

REDIRECT by Mr. McCarthy:

Q. I want you to take that chart and explain what you were about to do. Instead of this *Wolverton* coming down the river assume that she was coming across from Roberts' Stores and down so that she was quartering diagonally on the tide; will you please explain? A. This is rather a large

concern to explain from because there should be a drawing made of the position from each place and it would show a great deal better. But our rule has been, ever since I have been around this harbor, when a boat is coming down the East River—here is a large eddy tide comes in here at Pier 1, North River and Pier 2, about, in the East River, and it runs down almost half way across the Fort, and all vessels coming down the East River should always strike in about half way between the point of the eddy, as we call it, and the Battery, and that gives the boats that are going in the North River—because they always crowd around so as to get up here near the Battery—and if they are going up the East River to Market street they come around to Pier 4, and then shoot right across to Brooklyn, and there they get in the eddy tide again from there up to the bridge, and as a rule change—they don't miss one out of twenty—they go across the river again if they are bound up the river, draw up to Fulton Ferry, fetch in about Catharine Ferry, and then go up to the point we call the Hook, Jackson street, and some keeps that point after they get around—which is a very hard matter—and some goes across again and strikes in about Hudson avenue on the Brooklyn side and get in the Navy Yard about down there; if I was coming with a boat from Roberts' Stores, with a tow of any description, I should not think at all of going in closer than the middle of the river, until I got below Pier 2 or Pier 1. 565 566 567

Q. Suppose the tug starting from Roberts' Stores, or about there, having this tug on a hawser line a hundred feet long, and the tow itself a hundred feet long; I am now going to read the following direction or courses, and ask you what, under those circumstances, she ought to have done. "I was making" (that is the tug that was coming from Roberts' Stores), "a turn for the Battery, going down gradually across the tide, probably heading for the Cen-

568 tral Railroad of New Jersey; that is about where we were heading; the *Packer* was then heading directly up the river, straight up the river; we were not approaching head on; the *Packer* was near the edge of the eddy; I straightened up on my hawser, turned around and came out of the East River, a little porting on New York, and heading for just below Communipaw Dock; straight line from Roberts' Stores, clearing the Battery for five hundred feet—clearing the Battery more than four or five hundred feet, clearing it six hundred feet;" now where ought that tug to be—how can that tug get within two hundred feet of the New York shore if she is properly managed? A. She can't do it.

569 Q. This collision, it is, admitted, occurred within two hundred feet of Pier 1; how could that tug, coming from Roberts' Store, have got there if she had been properly managed? A. She couldn't do it—on the ebb tide.

Q. What have you to say in regard to the ebb tide causing the barge on this hawser to sag; would it not? A. It would, when the other struck the slack water.

Q. But not before? A. No, sir; if she was going any she would keep about even behind the tug.

Q. But when the tug struck the slack water she would sag? A. Yes, sir.

570 By Mr. Benedict:

Q. You have been around the Battery in tugs a good many times, haven't you? A. Yes, sir, a great many times.

Q. Are you prepared to say that you never, when you were going around there, passed a tow that was on your port side? A. I don't think I ever did in my life.

Q. You understand, I mean passed a tow coming up? A. Yes, sir, I understand.

PHILIP HOCK, being duly sworn and examined as 571
a witness for the claimants, testifies:

By Mr. McCarthy:

Q. What is your business? A. My business is master of tugboats.

Q. Whereabouts? A. Down Long Island Sound and around the Harbor.

Q. How long has that been your business? A. Since 1866.

Q. Are you now master of a tugboat? A. Yes, sir.

Q. What one? A. The *Robert Lockhart.*

Q. What do you know of, or what is the custom 572
in regard to tugs with tows coming down the North River, rounding the Battery, and going up in the East River on an ebb tide? A. The custom is always to keep in around the Battery as close as possible conveniently—as close as we can with safety.

Q. How far out would that be? A. Within two hundred feet, one hundred and fifty feet, three hundred feet.

Q. And what course do you pursue thus rounding the Battery, if you meet a tug and tow coming across the ebb tide from the Brooklyn shore—say, from Roberts' Stores, or thereabouts? A. I should try to keep inside of her—between her and the docks.

Q. Suppose this tug coming, say, from Roberts' 573
Stores, had on a hawser line a hundred feet long, a tow a hundred feet long; I ask you whether, in your opinion, it would be safe and prudent to port your wheel, go out in the ebb tide and try to get under the stern of that barge? A. I think it would not.

Q. Why not? A. Because the tide is sweeping that boat down right on top of us—that is the boat going up—and the chances would be we would foul.

574 CROSS-EXAMINED by Mr. Benedict:

Q. That would all depend upon how far off she was, would it? A. It depends some on the distance; yes, sir.

Q. Doesn't it depend entirely upon that? A. It would.

Q. Do I understand you to say that all boats that come around the Battery come within two hundred feet of the docks? A. Not all of them; probably keep certain distances.

Q. There is no rule of distance, is there—they come as they can, don't they? A. They come as they can; I always come around there as close as possible.

575 Q. Depending on what there is in the way; it always depends on that, doesn't it? A. Yes, sir.

Q. Coming around the Battery, you would want to save the eddy tide, wouldn't you? A. Going to the eastward, I would save the slack water all I can.

Q. If you were going up in the North River, it would be just the same, wouldn't it? A. No, sir; I should keep off in the East River ebb.

Q. When you are going around into the North River don't you want to save the eddy tide also? A. I would work in before I got up to the Stone Pier.

Q. Please answer my question; when you are
576 going around into the North River don't you want to save the eddy tide also? A. Yes, sir.

Q. Now, if you were coming around there the question as to whether you were to get inside of the tug coming down would all depend upon whether you thought it was your duty to keep out of his way or his to keep out of yours, wouldn't it? A. I might probably see the tug coming down—whether she could go inside with safety or not; if I thought she could not get in there I would not let her in there.

Q. Still you don't answer my question; whether

you would try to get inside would depend upon whether it was your duty to keep out of her way or hers to keep out of yours, wouldn't it? A. I think it was hers. 577

Q. Wouldn't the question whether you would try to go inside or not depend upon which had that duty? A. The boat that had the barge alongside had that duty I should think.

Q. I am not asking which had the duty? A. I don't understand your question.

Q. You said you would try to get inside of her; now I say, wouldn't that question of whether you would try to get inside of her be determined by the question whether it was your duty to keep out of her way? A. It would in one case. 578

Q. If it was your duty to keep out of her way you wouldn't necessarily go inside of her, would you? A. No, I wouldn't.

By the Court:

Q. For instance, if you saw indications that the barge was coming in to make land, you wouldn't run in for the sake of keeping inside? A. No, sir.

By Mr. Benedict:

Q. What if she were heading on the line you were? A. I wouldn't go inside; if I thought she was going to make that land at that place I should stop. 579

REDIRECT by Mr. McCarthy:

Q. Supposing, instead of making a landing at that place, she was heading for a place below Communipaw Dock, on the Jersey shore, so as to carry her seven hundred feet below the Battery? A. Then I would keep inside of her; coming around the Battery I should keep inside of the boat having the tow alongside.

Q. You would keep inside of the boat having the tow alongside? A. I should keep inside.

Q. Assuming that the boat that has got the tow

580 alongside and is going up, heading into the East River, has a duty to keep out of the way—still, suppose she sees this other tug coming across from Roberts' Stores, quartering on the tide, which is the best way for her to keep out of the way? A. The boat that comes from Roberts' Stores is the best to keep out of the way, because she is going with the tide.

Q. Which would be the best way if it were to be the *Packer* that was to keep out of the way—if she were coming across from Roberts' Stores in a line that would carry her seven hundred feet outside of the Battery? A. I don't understand it; where was the *Packer* at this time?

581 Q. She was within three hundred feet of the shore. A. It was not advisable for the *Packer* to go under her stern--she couldn't do it; if the *Packer* was in the middle of the river I should give way to that boat.

By the Court:

Q. That is to say, you would go to the right? A. I would go according to the rules of steamboats.

Recross by Mr. Benedict:

Q. Suppose the position was this—that you were coming up on the *Packer*, and had the other one on
582 your starboard bow, and she coming down had you on her port bow?

Mr. McCarthy: She wouldn't be coming down then—she would be crossing and coming down.

Q. What then? A. Then they would have to do the same as if she was in the middle of the river.

Q. If the *Packer* was? A. About the same thing; that would put the *Wolverton* in close to the docks almost; wouldn't it put her in that position—the port side of the *Packer*—she would have to be close to the New York shore.

Q. Repeated. Supposing the position was this— 583
that you were coming upon the *Packer* and had the other one on your starboard bow, and she coming down had you on her port bow, what then? A. What would I do—is that the question? I would leave her go inside if there is room to go there—if the boat was far enough out in the river to do that I should let her go inside; if not, I should keep next to the docks.

Q. Which do you mean by "her"? A. I would leave the tug and the barge to go inside, if the *Packer* was far enough out in the river—if there was room enough to do it.

By Mr. McCarthy: 584

Q. Suppose the *Packer* was within three hundred feet of the shore? A. Within three hundred feet there wouldn't be room enough with a tow--a hawser tow—on the ebb tide; you couldn't do it—not off Pier 1; you couldn't swing the tow in with safety—you couldn't swing the tow in that slack water with safety.

Q. How far out do you want the *Packer* to be in order to go around to the right and under the stern of this barge that the *Wolverton* was towing? A. She ought to be off there five or six hundred feet.

Q. How wide do you make the river there? A. I should judge the river there is three-quarters of a 585
mile; a little over half a mile wide; I mean across to Governor's Island.

A. Suppose you leave out the question of her coming down the river; suppose she is coming right across from Roberts' Stores and diagonally, quartering on the tide?

Mr. Benedict: Isn't that coming down?

Q. How then as to your going outside or inside, if you were on the *Packer*? A. I should go inside of that boat, between her and the docks.

586 By Mr. Benedict:

Q. Do you mean that you would go inside if she had you on her port hand? A. No, sir; I don't say that.

By Mr. McCarthy:

Q. Don't you say that she might have you on her port hand from the moment she left Roberts' Stores? A. She might have, provided I was far enough to the northward, up towards the Stone Pier she might.

Q. Do you answer as you have done with that fact in view? A. Yes, sir.

587

MICHAEL MCGOLDRICK, being duly sworn and examined as a witness for the claimant, testifies:

By Mr. McCarthy:

Q. What is your occupation and where do you reside? A. Tugboating, captain of a tugboat; Brooklyn.

Q. Do you go around the harbor of New York? A. Yes, sir.

Q. How long has that been your occupation? A. About four years in New York; about sixteen years altogether.

588 Q. What tug are you now on? A. The *Fannie P. S.*

Q. Do you know the tug *E. A. Packer?* A. Yes, sir.

Q. Have you ever been in command of her? A. A few days I think.

Q. Do you know what her hauling capacity is? A. Yes, sir.

Q. Suppose you are going around the Battery and heading up in the East River on an ebb tide that is running four to five knots an hour and a Cross Creek barge is on your port side laden with four hundred twenty-five or four hundred fifty tons of coal;

how fast by the land could the *Packer* carry that 589
barge against the strength of the ebb tide?

Objected to on the ground that it does not appear that the witness has had sufficient experience to testify on that subject.

Q. Do you know all about her, or don't you? A. I know a little about it, I know about what kind of a boat she is; I have been on her a few days, I don't remember any longer than that.

Q. Haven't you been connected with the line she belongs to? A. Yes, sir.

Q. How many years? A. Two and a half or three years.

Q. Do you know what her hauling capacity is? A. 590
It would depend on where she would be.

Q. Do you know what her strength is? A. Yes, sir; I think I do:

Q. Can you answer that question intelligently, how fast she could haul such a tow as that against the strength of the ebb tide in the East River? A. I don't know exactly; not very fast.

ISAAC L. FISHER, being duly sworn and examined as a witness for the claimants, testifies:

By Mr. McCarthy:

Q. What is your occupation? A. I am agent of the Perth Amboy Towing Line. 591

Q. Where do you live? A. Brooklyn.

Q. Have you ever been connected with the South Amboy Towing Line? A. Yes, sir.

Q. Do you know the *Packer?* A. Yes, sir.

Q. Do you know what her hauling capacity is? A. Yes, sir.

Q. How long have you been connected with tugs and tugboating in the harbor of New York? A. Ever since I left school; about twenty years.

Q. State what the rule is in regard to tugs with tows coming down the North River and going

592 around the Battery in order to go up the East River?

Objected to on the ground that it is not shown that the witness is qualified to testify on this point.

Q. You have been a pilot on tugs? A. Yes, sir.

Q. How long? A. My connection with the steamboating business has been in every capacity ever since I have been on them; I have always been an owner myself, and what vessels I have not owned myself my father owned, so I have been in every capacity.

Q. Are you familiar with tugs going both ways,
593 at all stages of the tide, going around the Battery? A. Yes, sir; I am.

Q. Take the case where the tide is running out of the East River—strong ebb tide, what is called half ebb; what is the rule or custom in regard to tugboats having tows coming down the North River, rounding the Battery and preparatory to going in the East River; how do they go around the Battery? A. Vessels coming down the North River and bound up the East River keep close to the Battery wall, the tide being ebb.

Q. That is the custom? A. Yes, sir.

Q. When you say close, how far away do you mean? A. That depends entirely upon the draft of
594 water.

Q. Take such a tug as the *Packer?* A. She could keep within two hundred feet.

Q. How far out is the slack water, going around the Battery when the tide is running strong ebb out of the East River? A. I should think four hundred feet.

Q. Suppose you take the *Packer* and put on her port side a Cross Creek barge laden with four hundred and fifty tons of coal; how fast could she stem the strength of the ebb tide in the East River—how fast could she go against it? A. At that point do

you mean; off the Battery; off the Battery or off Pier 2, 3 or 4? 595

By the Court:

Q. In slack water there, or in the strength of the ebb tide in the East River; how fast could she go? A. At that particular point I think she would go two miles an hour past the land.

Q. At that point; are you speaking of within the eddy? A. No, sir; outside of the eddy.

By Mr. McCarthy:

Q. What is the proper course going around the Battery in that way, say you got opposite the Barge Office and saw a tug coming from Roberts' Stores, or in that neighborhood, across the river and slightly down, with the tide running strong ebb, and that tug you saw coming across has got a tow a hundred feet long on a hawser; what is the proper course for you to take rounding the Battery, to go with reference to that tug coming across; she says she is heading for a point below Communipaw Ferry on the Jersey shore, and so far as to clear the Battery nicely by seven hundred feet? A. You ask me what course she should pursue? 596

Q. Where you would go? A. I would keep on the Battery side.

Q. You would go inside? A. Certainly; by all means. 597

Q. How many whistles would you give her to indicate that? A. Two.

Q. Do you think it would be safe or prudent to attempt to go outside of her and around and under the stern of her barge? A. I should consider it very imprudent.

Q. Why? A. Because just as soon as I sheer off to the starboard or to the Brooklyn shore I then strike the strong ebb tide, and I should consider I would be taking great chances of having a collision; no prudent man would do a thing of that kind.

598 Q. Supposing this tug that is coming across—instead of keeping that course of which I have spoken to you, that is, for a point below Communipaw Ferry—ports her wheel and takes a rank sheer of five points? A. He must mean to collide with the other tug if he did.

CROSS-EXAMINED by Mr. Benedict:

Q. Do I understand that you have had experience in towing vessels around the Battery yourself in charge of a tug? A. Yes, sir.

Q. How long have you been in charge of tugs—engaged in that business? A. I have been connected
599 with the towboat business for over twenty years and a large portion of that time—fifteen or sixteen years I have been engaged on board tugs; I have been in every capacity; part of the time the tugs that I was on were owned by my father and when he died they were owned by myself.

Q. My question is, how much experience have you had in towing vessels yourself? A. I have had a life-time experience.

Q. How much experience have you had yourself in charge of the navigation of vessels, towing vessels around the harbor of New York? A. I should think about fifteen years.

Q. As steamboat pilot yourself? A. Not all the
600 time as pilot; I have been on board and all the time on the lookout for that number of years.

Q. How much of the time have you been pilot? A. I might say, in fact, I have been pilot all the time.

Q. How long a time have you been tugboat pilot? A. In the strict letter of the word "pilot," I have not been all the time, still I have had sole control of that tug in every capacity.

Q. How long have you been pilot? A. Actually pilot—how many years? I don't know as I was ever any particular years actual pilot.

Q. Have you ever been licensed as a pilot? A. No,

sir; that is the reason why I never held the strict duty of pilot. 601

Q. You have never been licensed as captain, have you? A. No, sir; I always ran under a license as engineer; but that tug was my property and I always saw the thing went safely and I am competent to take ——

Q. The control of the navigation was under people besides yourself? A. It was under my control.

Q. As a matter of fact isn't this the case, that vessels coming around the Battery come around at all sorts of distances? A. I don't think any vessel coming around the Battery, such as the vessels that have been described here, come around any different from what I said; vessels do come around the Battery in the middle of the river; and those vessels are the large Sound steamers, which would be very imprudent to come any other way, but the vessels described to me to-day keep off the distance I have named. 602

Q. What distance do you name? A. About two hundred feet.

Q. Do you mean to say all tows that come around the Battery from the North River come two hundred feet off? A. I mean to say all tows coming in that eddy, some perhaps go three, possibly more, on the edge of the eddy.

Q. How far out does the eddy extend? A. About four hundred feet. 603

Q. Not further? A. Not by the Barge Office, I think.

Q. How far does it extend between off Pier 1 and Castle Garden? A. As you go towards Pier 1 it extends a little; I think take a direct line from the north end of Staten Island it goes off five hundred feet, possibly a little more.

Q. You think then that you never saw a vessel towed around that came around there outside of that eddy? A. Not that sort of tow; no, sir.

Q. You said that you would consider it imprudent to try to get outside, that is, on the Governor's Island

604 side of this tow that was coming, because you would strike the ebb tide; the moment that you struck the ebb tide, wouldn't that have the same effect as the porting of your wheel? A. When you first struck it it would; yes, sir.

Q. So that that would assist your port wheel? A. Yes, sir.

Q. Supposing there was no tide at all, would you consider it imprudent to port your wheel and pass under a port wheel? A. No; I should not.

Q. But you think it is imprudent because the ebb tide would assist the port wheel? A. Yes, sir.

Q. Whether it was prudent or not all depends upon the distance, doesn't it? A. Not necessarily.

605 Q. Why doesn't it depend upon what distance apart the two vessels were? A. There are two reasons why vessels keep close to the Battery wall on the ebb tide.

Q. I am not asking that; I am asking the reasons why you wouldn't pass to the right? A. Because I would want to keep inside of the boat to keep out of the way of vessels coming down the East River, knowing they should keep out of the strength of the tide coming down.

Q. You say it would be imprudent to pass to the right; why? A. That is why.

Q. I ask you if the imprudence doesn't depend entirely upon the distance apart of the two vessels? A. No, sir.

606 Q. Do you mean to say that you cannot go to the right whatever distance they are apart? A. You could go to the right.

Q. Then where would be the imprudence if you started soon enough? A. I don't quite understand you.

Q. Supposing there was another vessel coming down the river with the strength of the ebb tide? A. What would a man want to go out there for, bound up the East River?

Q. My question is this: you have stated that it would be imprudent to try to go to the right of a

vessel that was coming down and across; now I ask you where the imprudence would be if you started far enough distant to pass on that side? A. You couldn't see a vessel far enough to warrant a man going to the right at that particular point. 607

Q. How far off would it be necessary to see him in order to get past to the right? A. With a strong ebb tide, I should think a mile.

Q. You think you wouldn't get past to the right there unless you were a mile away? A. I should not think it would be prudent to try it.

Q. Where are you assuming, according to that, that the two vessels would meet—in the ebb tide or in the eddy? A. In the ebb tide.

Q. Supposing they were in such position that they met in the eddy; how far off then would you have to be in order to pass to the right? A. If they were head and head it wouldn't be necessary to be over a quarter of a mile; but they wouldn't want to be head and head. 608

Q. Supposing you had the other vessel on your starboard hand and she had yours on the port side? A. I should think it would be better to keep inside.

Q. How far off would it be required then? A. A fourth of a mile, with one vessel on a hawser and the other alongside.

[CLAIMANTS REST.] 609

JEREMIAH CONNORS, being duly sworn and examined as a witness for the libellants, testified:

By Mr. Benedict:

Q. What is your business? A. Steamboat pilot, and have been steamboating since I was 14 years old; I am 27; I have been going with tows around the Battery, all the time from Harlem around the Battery and chock up as far as Hoboken and further.

610 Q. In your experience in taking tows down the East River on the ebb tide to go into the North River, on which side of you do the tows that you meet coming from the North River into the East River, go? A. They want to go on our port side; I blow two whistles and they can go to the left.

Q. Do they all go on one side? A. No.

Q. Some on one side and some on the other side? A. Some on one side, some on the other side.

Q. And what decides as to which side they go? A. On my left side.

Q. What I want to know is how do you tell; what is it makes them go on one side or the other side? A. I blow two whistles.

611 Q. If you go on what side you blow two? A. If I go to the left I blow two, and if I go the right I blow one.

Q. How do you tell which to blow, whether one or two? A. I know what way they are coming and which to blow; if they are going to the right, I blow one and to the left I blow two.

Q. You give both kinds of whistles? A. Yes, sir.

Q. One boat will blow two and another boat will one? A. Yes, sir; and I answer the one that comes first.

Q. You answer, whichever one it is? A. Yes, sir.

PATRICK DEVINE, being duly sworn and examined
612 as a witness for the libellants, testified:

By Mr. Benedict:

Q. What is your business? A. Steamboat captain; I have been steamboat captain three years, since I had my license; I have been in the steamboating business all my life.

Q. Have you been in the habit of towing around the harbor? A. Yes, sir.

Q. What kind of vessels? A. All kinds of vessels from a raft to a ship.

Q. How many times do you tow around the Battery from the East to the North River, and from the

North to the East River? A. I have towed a good many times. 613

Q. Often times more than once a day? A. Yes, sir; three or four times some days; I have towed night and day, both times.

Q. Have you often towed vessels from the East River into the North on an ebb tide? A. Yes, sir; I used to follow the Gate business altogether, taking three or four vessels alongside.

Q. When you have been towing vessels that way around on the ebb tide have you often met tows coming from the North River in the East River? A. Yes, sir.

Q. Is there any universal rule as to which side they go of you? A. No, sir. 614

Q. Some go one side and some the other? A. Yes, sir.

Q. Is there any rule if you are going down the East River on a strong ebb tide, and another is coming up, as to which has the right of way? A. Yes, sir.

Q. What is the rule with reference to that? A. Going down sometimes boats are going in and out of the ferry slips at South Ferry and Hamilton Ferry, and sometimes they are coming out of the slip, and a tow is coming down the East River on a hawser, and sometimes they blow for you to go under their stern and you stop and port your wheel and go under the stern of the boat coming out, and then you might meet a tow coming around the North River, and as long as you are in close to the dock you blow one whistle and take them on your port hand and go right out in the North River that way. 615

Q. It all depends upon the position of your boat and the position of the other tow, does it not? A. Yes, sir.

Q. Now, where there is a vessel going with the tide and another one coming up against the tide, each with a tow, which can sheer the easiest? A. The one coming up against the tide.

616 CROSS-EXAMINED by Mr. McCarthy:

Q. Do you know about taking tows around the Battery from the North River into the East River? A. Yes, sir.

Q. When you are coming on the ebb tide around from the North River into the East River around the Battery, what do you do? A. We keep close to the docks to get slack water.

Q. That is customary, is it? A. Sometimes it is and sometimes it isn't. Sometimes two ferryboats are going into the slip and out of the slip. You may meet a ferryboat going in and one coming out.

Q. But suppose there is nothing in the way? A. Well, you generally sometimes get pretty close into
617 the dock.

By Mr. Benedict:

Q. Sometimes you do and sometimes you do not? A. Yes, sir.

Q. It all depends on circumstances? A. Yes, sir.

By Mr. McCarthy:

Q. Do you belong to the Erie Railway? A. No, sir.

Q. What service are you in? A. I ain't doing anything just at present.

618 JOHN MCCLEAN, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Benedict:

Q. What is your business? A. Steamboating.

Q. How long have you been steamboating? A. Seventeen years. I am a licensed pilot now and have been for nine years. I am also a licensed master as well as pilot. I have been in all kinds of towing employ, including lighterage. I have been in Twombley's employ—"Vanderbilt's," as they call it—and I have been in passenger business and in all kinds.

Q. You have been in the habit of towing around the point of the Battery? A. Yes, sir. 619

Q. With both kinds of tide? A. Yes, sir.

Q. Going around from the East River into the North River with the ebb tide have you frequently met tows coming from the North River into the East River? A. Yes, sir.

Q. Is there any universal or customary rule as to which side they go? A. No, sir; I never have learned of any.

Q. How, then, do they actually go? A. They go the best way they can.

Q. Do they actually go on one side or on the other, or do they go both sides? A. They go both sides—go any side. 620

By the Court:

Q. Both sides of what? A. Of the boat coming.

Q. The boats go either side of each other? A. Yes, sir.

By Mr. Benedict:

Q. What is your experience as to which can sheer the easier, a vessel that is going down with the ebb tide or a vessel that is going against it? A. You can handle a boat easier going against the tide.

CROSS-EXAMINED by Mr. McCarthy:

Q. Supposing you are towing a heavy tow around the Battery from the North River, and you are going up into the East River, and the tide running a strong, heavy ebb of four or five knots an hour, and you have a heavy tow on your port side; now, how would you try to get around the Battery? A. I would try to keep out of the eddy tide until I struck the fair tide out in the river. 621

Q. You would strike the ebb tide? A. No, sir.

Q. Where would you go? A. I would keep a safe distance off the Battery.

A. How far would that be? A. So I wouldn't strike it.

622 Q. How far should you? A. Off a hundred feet with most any kind of barge.

Q. You would think that safe? A. Yes, sir.

Q. Suppose you were within a hundred feet of the new Barge Office, and you saw a tug coming from Roberts stores, and she had a barge on a hawser a hundred feet long, how would you expect her to pass you if she was going over to New Jersey to Communipaw Ferry or a point below; you being within a hundred or a hundred and fifty feet of the Battery, which side of you would you expect her to go.

Objected to.

A. That would depend on circumstances until you
623 got close enough to find out; if she is coming from Roberts' Stores, or over that way, there is a good many things to turn up.

Q. Suppose she was in the middle of the river four or five hundred yards off, coming from Roberts' Stores; what would you do? A. Blow two whistles.

Q. So she would go to your starboard? A. How far off shore?

Q. Suppose you were a hundred or a hundred and fifty feet off shore? A. I should bow two whistles a hundred and fifty feet off.

Q. You would keep along inside and let her go outside? A. Yes, sir.

Q. That would be good fair tugboat management?
624 A. That depends on circumstances, and then there is other vessels coming down too.

Q. Now, suppose that instead of heeding your whistles she were to port her wheel and take a rank sheer of five points; what would you think of that sort of tugboating?

Objected to as immaterial and incompetent.

Q. Sheers is something you can't govern sometimes.

Q. Suppose he actually ports his wheel five points so as to head five points in farther toward shore? A. Never saw it done.

Q. What would you think if a pilot did it? A. I never heard tell of that man that did. 625

Q. You would think that he was wild, wouldn't you? No answer.

REDIRECT by Mr. Benedict:

Q. That all depends upon the position of the boats with reference to each other? A. Yes, sir.

Q. If you saw a tugboat on your starboard hand and she was showing her port hand to you, you wouldn't expect to cross her bow, would you? A. No, sir.

Q. You would expect to go under her stern, wouldn't you? A. Yes, sir.

626

EDWARD SIMMS, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Benedict:

What is your business? A. Steamboating; I am a licensed pilot and captain; I have been captain about five years and I have been in the tugboat business about eleven years; I am twenty-six years old.

Q. Have you towed around the Battery often times? A. Yes, sir.

Q. What kind of vessels have you towed around? A. All kinds.

Q. Have you towed vessels down into the East River from the North River on the ebb tide? A. Yes, sir. 627

Q. At the strength of the ebb tide have you met other tows coming from the North River into the East River? A. I have.

Q. Is there any rule as to which side of vessels going into the East River they go? A. No, sir.

Q. Some go one side and some the other? A. Go either way a man can get through the best.

Q. All depends upon the circumstances and position of one boat with reference to the other? A. That is it exactly.

628 Q. What do you say as to the ease of sheering of a vessel going down with the ebb tide or one going around the Battery up against the ebb tide? A. The boat going against the tide is supposed to give way for a boat going with the tide.

CROSS-EXAMINED by Mr. McCarthy:

Q. What is the name of your tug? A. The *Elmira.*

Q. Suppose that on the *Elmira's* port side you had a Cross Creek barge loaded with 450 tons of coal; you start from Pier 9, North River, with the intention of going around the Battery and up the East River to Sixty-first street, and there is a strong ebb
629 tide in the East River running four or five knots, how would you get around the Battery? A. I would keep off the Battery.

Q. How far? A. I would keep off the Battery at the least calculation 400 yards going out of the North River until I got abreast of the bath; that is near the South Ferry; then I would haul up with the ebb tide into the East River.

Q. Then you would haul up when you got opposite the bath? A. I would haul in there if every thing was clear so I could.

By the Court:

Q. You would keep 400 yards off where? A. Off
630 the Battery at all times.

By Mr. Benedict:

Q. The bath house is not on the Battery then? A. It is near where the new Custom House or Barge Office is; near the South Ferry.

Q. How near the Barge Office would you go? A. Depends all on circumstances.

Q. Suppose everything was clear? A. I would go within a hundred feet of it if I could get there.

Q. How far off would you go from Pier 1? A. I wouldn't go in short of 100 feet.

Q. Now, is not that the rule—is not that the cus- 631
tom? Don't tugs usually do that when they are going around with tows? A. If everything is clear and they can.

Q. When they are going around from the North River into the East River with the ebb tide they all try to do that so as to get out into the eddy, don't they? A. Yes, sir.

Q. If you went out into the middle of the river into the strength of it, how much would you make? A. I wouldn't make much.

Q. Would you be in the way? A. No, sir, not in the way; I have went clear across the river.

Q. If you went a hundred and fifty feet from the Barge Office, or at any rate in slack water, and you 632
saw a tug coming from the neighborhood of Roberts' Stores, and had a tow on a hawser a hundred feet long, and this tugboat heading for a point south of Communipaw Dock, heading so as to go below the Battery at least 700 feet? A. And I am abreast of the Barge Office a hundred and fifty feet?

Q. Yes; now what kind of whistles would you blow, you seeing her 600 or 700 yards off? A. Six or seven hundred yards off from the docks out in the middle of the river?

Q. Seven hundred yards from the boat going towards Communipaw Ferry? A. Seven hundred feet from the dock?

Q. I don't say how far from the dock, but the boat 633
you are meeting is headed so as to go 700 feet clear of the Battery, and will strike the Jersey shore below Communipaw Ferry, and you are a hundred and fifty feet from the new Barge Office; what kind of whistles would you blow to her? A. I would blow two in that case.

Q. That would mean what? A. That would mean to pass to the starboard of one another.

Q. You would have her on your starboard hand and she would have you on her starboard hand? A. Yes, sir, that's it.

634 Q. That would be right management? A. That would be right in that position; yes, sir.

Q. Suppose you were two hundred feet away from the Barge Office, would you do the same thing? A. I would if she was 700 feet off in the river from the docks.

Q. Suppose she did not answer your whistles at all, but soon afterwards ports her wheel and takes a rank sheer of five points in towards the New York docks? A. And she don't answer my whistle?

Q. She don't answer and she takes a rank sheer? A. I have a boat on my port side?

Q. Yes. A. I would stop and back my boat.

Q, What would you think of her manœuvre? A.
635 I wouldn't think much of it? I would turn my boat around so I wouldn't hit her.

Q. It would be pretty poor tugboating to take a rank sheer of five points in that space? No answer.

Q. You say you wouldn't think much of it? A. No, not according to that I wouldn't—a man wouldn't answer my whistles and would expect to go across my bow.

By Mr. Benedict:

Q. In that case that the gentleman has put to you, you would see the starboard side of the boat that was coming from the East River, would you? A.
636 You would have to see her starboard side if she was in that position; you couldn't help it.

Q. Suppose that you were so far out from the pier as to see her port side? A. I would blow one whistle and pass to port.

GEORGE GAVIN, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Benedict:

Q. What is your business? A. Steamboat captain.

Q. How long has that been your business? A. Since I was 17 years old I have been steamboating; I am 38 years old the 10th of next July; I have been captain very nigh four years; I am familiar with towing around the harbor on all kinds of tide. 637

Q. In towing from the East River into the North River on the ebb tide have you frequently met tows coming from the North River into the East River? A. Yes, sir.

Q. Is there any rule or universal custom as to which side they go? A. No, sir, not to my knowledge; I never heard of any.

Q. Some go one side and some the other? A. Yes, sir.

Q. All depends on how they are approaching? A. Yes, sir. 638

Q. And what do you say as to which vessel would have the right of way in that case; the vessel going with the tide or the vessel going against it? A. The vessel going with the tide has the right of way.

CROSS-EXAMINED by Mr. McCarthy:

Q. Where do you find that rule? A. By the Government Rules and Regulations.

Q. It is in the Rules and Regulations? A. Yes, sir, in our little book that we have, the Inspector's book.

Q. The rule that the vessel going with the tide has the right of way? A. Yes, sir; a vessel going with the tide will keep clear. 639

Q. Suppose the vessel going with the tide has got the other vessel on her starboard side; does what you call the rule then hold good? A. That would be according to circumstances.

Q. What is the custom in New York? Suppose the tug has a loaded tow and she is going around the Battery to the North River into the East River and there is a strong ebb tide in the East River; what is the rule in regard to her going around the Battery? A. If everything is clear for going around I gener-

640 ally keep off about 300 feet away from the Battery wall.

Q. That is safe navigation, is it? A. That is a safe distance providing everything is clear; it would be according to what is going down out of the East River whether I would or not.

Q. If you saw a vessel coming down out of the East River nearer than you were to the Battery you would keep out farther still? A. Yes, sir.

Q. Farther out towards the middle of the river? A. Depends on the sheer the man coming down the East River would have.

Q. Suppose he was going down the river and the tide was going out? A. If he had a sheer on him or
641 was going for the Battery I would blow one whistle and go outside.

Q. Suppose he had a tow 200 feet long, would you still go outside? A. Yes, sir, because I could clear him easier than he could me.

Q. Would you do that if you were going around with a heavy tow against the tide? A. Yes, sir; I have done it time and time again.

[TESTIMONY CLOSED.]

642

DISTRICT COURT OF THE UNITED STATES 643

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY LIGHTERAGE COMPANY

AGAINST

The Steamtug "E. A. PACKER," her engines, tackle, &c.

TO THE HONORABLE ADDISON BROWN, JUDGE OF THE SAID COURT: 644

The petition of John Scully, claimant of the steamtug *E. A. Packer*, her engines, &c., herein proceeded against, respectfully shows to the Court:

FIRST.—That he now is, and at the times hereinafter in this petition mentioned was the sole owner of the steamtug *E. A. Packer*, and has duly appeared by his proctor, and filed his answer to the libel herein.

SECOND.—That at the time of the collision in the libel mentioned, one Finley Fraser was, as your petitioner is informed and believes, the owner of the 645
steamtug *Dr. John Wolverton*.

Your petitioner further shows that the said tug the *Dr. John Wolverton*, was wholly to blame for the said collision, and should have been proceeded against at the time the libel herein was filed and made a party to this suit, or if said vessel could not be found, then that process of attachment *in personam* against her owner should have been issued.

Your petitioner alleges further that the truth in respect of said collision, the circumstances surrounding it and the immediate cause to be as follows, that is to say:

646 On or about the 25th day of October, 1880, the tug *E. A. Packer*, being well manned and equipped, and in all respects seaworthy, had brought a tow of loaded boats from Port Johnson to New York. She had taken her tow up the North River, discharging boats at different places. Her last landing in the North River was Pier 9. She proceeded to go down the North River, round the Battery and up the East River as far as Sixty-first street, where she was to discharge the last boat in her tow.

When she left Pier 9, she had but one boat in tow, to wit, Cross Creek barge No. 5, which was heavily laden with coal. This barge was securely lashed to her port side. It became necessary for her in round-
647 ing the Battery to keep close to the New York shore, because at that time, which was between four and one-half past four o'clock P. M., the tide was running out of the East River, and sweeping around the Battery with a strong current, so that it would have been very difficult for the *Packer* to have held up with her tow if far out in the stream. The *Packer* was going at the rate of not more than three or four miles through the water. As she was rounding the Battery, she was not more than 200 yards, or about that distance, from the New York shore. She was making very little headway past the land, it being found very difficult to make head with her tow against the tide. As she was rounding the Battery,
648 and when about opposite Pier 1, East River, she saw some distance ahead, at least five hundred yards ahead, the steamtug *Dr. John Wolverton*, having in tow on a hawser, a barge which your petitioner believes to have been the barge *Atlanta*. The *Wolverton* and her tow were coming down and partly across the East River in the full sweep of the tide. The *Wolverton* was much nearer the middle of the stream than was the *Packer*, being several hundred feet away from the New York shore. The barge *Atlanta*, in tow of the *Wolverton*, as aforesaid, did not follow the tug in a direct line, or on the same course, but was swept by the tide considerably further out into

the stream than was the tug. The hawser line from 649
the *Wolverton* to her tow was about 180 feet long.

It was apparent at once to the persons in charge of the *Packer* that she, the *Packer*, could not port her wheel, and go to the right of the *Wolverton* and her tow. The *Wolverton* was coming on at the rate of at least seven miles per hour past the land, and she was so far out in the river that even had the *Packer* been unencumbered with a tow, it would have been impossible to clear the barge *Atlanta*, by swinging off on a port wheel. But as the tide was then running, loaded down as the *Packer* was, with a heavy tow, any movement to the right would have rendered a collision with the *Wolverton* herself inevitable. At this time there were two men in the 650
pilot house of the *Packer*, and a lookout forward on deck.

One of the men in her pilot-house was a regularly licensed pilot.

Accordingly when the tugs were at least 505 yards apart, and when the tug *Wolverton* had really nothing to do but to keep her course, in order to avoid a collision, the tug *Packer* blew loudly and distinctly two whistles. This signified that she, the *Packer*, would keep her wheel to starboard and go to the left, that is, between the *Wolverton* and the New York shore, which was the only course possible for her to take. The *Wolverton* made no reply whatever to those whistles, neither did she change her course or 651
slacken her speed. Whereupon the *Packer*, after a lapse of but a few seconds, again blew two whistles, this time sharply and quickly. The *Wolverton* paid no attention to these, neither did she slacken her speed, but she did change her course somewhat, in that she seemed to be making in more for the New York shore, as if with the intention of running under the *Packer's* bows and passing between her and the New York shore.

It then became evident that a collision was imminent with the *Wolverton*, or with her tow, because although the *Wolverton* might pass under the

652 *Packer's* bows, the tow *Atlanta*, swinging as she did with the tide, could hardly do so.

Accordingly the headway of the *Packer* was stopped, her engine was reversed and she began slowly to go back. The *Wolverton*, coming on, passed under her bows quite narrowly, and passed down on the port side of the Cross Creek barge, without touching her, but the barge *Atlanta* was not able to do so. While crossing the the bows of the *Packer* and her tow, her port side came in contact with the stem of the barge, and received some injuries above her water line.

Your petitioner charges that the whole fault of the said collision is attributable to the tug *Dr. John*
653 *Wolverton*, and to her tow, the barge *Atlanta*, in the following respects:

1st. The tug *Wolverton* did not have a good and sufficient lookout.

2d. The tug *Wolverton* was in fault in towing the barge *Atlanta* on a hawser, when the tide was so strong, and around a point of so much danger as the Battery.

3d. The tug *Wolverton* was in fault in not heeding the signal whistles of the *Packer*.

4th. It was gross carelessness in the tug *Wolverton* to attempt to pass the *Packer* on her port side, it being evident that if she did so, her tow would swing against the *Packer* or her barge, and there
654 being, moreover, every facility for the *Wolverton* to keep to the left; that is to say, further out in the stream.

5th. The tug *Wolverton* was going at too high a rate of speed.

6th. The barge *Atlanta* was in fault for not having kept clear of the Cross Creek barge, as she might have done had she been properly steered. She was also in fault in not casting off her hawser before the collision occurred.

Your petitioner further alleges that the tug *Packer*

was in nowise to blame for the said collision. She took every means to avoid it that was possible, and she took them in time. She was moving very slowly and carefully, and had been doing so ever since she first felt the ebb tide. 655

Wherefore, your petitioner prays that a warrant of arrest, in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said Finley Fraser, and that he may be cited to appear and answer on oath the libel in this action and the matters set forth in this petition, and that a clause of foreign attachment against the property of the said Finley Fraser, if he cannot be found within this district, be made part of the process against him, and 656 that sufficient of his goods and chattels be seized to answer the claim herein with costs. And that your petitioner have such other and further relief in the premises as in law and justice he may be entitled to receive.

JOHN SCULLY.

Sworn to before me this 15th day of May, 1883.

THOS. J. DE LANEY,
Notary Public, Kings Co.
Certif. filed N. Y. Co.

EDWARD D. MCCARTHY,
Proctor for Petitioner. 657

658 At a Stated Term of the District Court of the United States of America, for the Southern District of New York, held at the United States Court Rooms, in the City of New York, on the 13th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Present—The Honorable ADDISON BROWN,
District Judge.

THE NEW JERSEY LIGHTERAGE COMPANY

659 vs.

The Steamtug "E. A. PACKER," her engines, &c.

This cause having been duly heard on the pleadings and proofs, and argued and submitted on briefs and points by the advocates for the respective parties, and due deliberation being had in the premises;

Now, on motion of Edward D. McCarthy, Esq., proctor for claimant herein, it is

Ordered, adjudged and decreed, that the libel in the above entitled cause be and the same hereby is
660 dismissed on the merits, with costs, taxed at the sum of $140.33 against the libellant.

And it is further ordered that unless an appeal be taken from this decree within the time limited by law and prescribed by the rules and practice of this Court, the stipulators for libellant's costs forthwith pay into the registry of this Court the amount of their stipulation, and that upon said payment thereof the Clerk distribute the proceeds in satisfaction of the taxed costs of the claimants herein.

ADDISON BROWN.

The libellant duly appealed to the Circuit Court from the foregoing final decree.

SUPPLEMENT TO APOSTLES.

661

The following extracts of testimony were put in evidence on the part of the libellant:

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PURNELL, Master of the "CROSS CREEK BARGE NO. 5"
vs.
Steamtug "DR. WOLVERTON."
} In Admiralty.

662

PHILADELPHIA, March 30, 1881.

Present—Messrs. COULSTON and MCCARTHY.

JAMES S. PURNELL, sworn and examined:

By Mr. McCarthy:

* * * * * *

Q. How far from the Battery, to your best knowledge and recollection, [were you] at the time of the collision? A. We were a little above the Battery.

663

Q. How far away from the shore of the Battery? A. About three hundred and fifty feet.

Q. Is that guesswork? A. That is as near as I can come at it.

Libellant's Testimony, p. 6.
Cf. Apostles, p. 127, *et seq.*

* * * * * *

Q. How far away do you think the *Wolverton* was then [when you heard two whistles from the *Packer?*] A. The *Wolverton* was about three hundred and fifty feet off us.

Libellant's Testimony, p. 10.

664 By Mr. Coulston:

* * * * * *

Q. When the *Packer* blew the whistles, how far off was she from the *Wolverton?* A. About three hundred and fifty feet.

Libellant's Testimony, p. 15.

ELI A. KELLAM, sworn and examined:

By Mr. McCarthy:

* * * * * *

Q. How large a tow had she, [the *E. A. Packer*], brought up that noon? A. She had brought three, I think.

665 Q. Three of what? A. *Cross Creeks.*

Q. Each one being what, compared to this one? A. I think the other two were smaller.

Q. What tonnage have you yourself known the *E. A. Packer* to carry or haul against strong ebb tide? A. We have taken tows from South Amboy to New York of over four thousand tons with the *E. A. Packer.*

Q. What tide? A. We have to stem the tide in the Kills, and have to stem the first of the ebb tide in New York Bay.

Libellant's Testimony, pp. 34, 35.
Cf. Apostles, p. 175.

* * * * * *

666 Q. Whereabouts, as respects the New York shore did this collision occur; off what pier? A. Right off the South Ferry.

Q. How far from the shore? A. I couldn't tell you exactly how far. I suppose from one hundred and fifty to two hundred yards; it might have been further.

Q. You think it was from four hundred and fifty to six hundred feet from the New York Shore? A. Yes, sir.

Q. Do you mean by that the shore line or the ends

of the piers? A. I mean from the ends of the piers. 667

Libellant's Testimony, p. 40.
Cf. Apostles, p. 178.

* * * * * *

STEVEN SLOVER, sworn and examined:

By Mr. McCarthy:

* * * * * *

Q. How did the *Wolverton* have you, [when you first saw her]? A. She was on my starboard bow.

Q. How were you as to her? Did she have you on her starboard or on her port bow? A. She had me on her port bow. She was on my starboard bow. 668

Q. Will you take a piece of paper and make a little diagram of their positions?

The witness: I will try.

Witness makes a diagram, saying: "I can't give you much of a diagram."

Diagram marked "Exhibit 3, March 20, 1881."

Q. That diagram illustrates, according to your judgment, the relative positions, similarly; the way they were heading? A. Something like that; yes, sir.

Q. Do you mean to say that it is at all accurate in regard to distances? A. No, sir.

Libellant's Testimony, pp. 61, 62. 669
Cf. Apostles, pp. 135, 141, *et seq.*

* * * * * *

RICHARD FURMAN, sworn and examined:

By Mr. McCarthy:

* * * * * *

Q. What first attracted your attention to the matter? A. I heard two whistles blowing, and I looked out to see what was coming.

Q. Did you go out of the engine room? A. No, sir.

670 Q. You looked out? A. I looked out.

Q. How far were you from the New York shore when you heard these whistles blowing? A. About two hundred yards, I judge, or two hundred and fifty.

Libellant's Testimony, pp. 72, 73.
Cf. Apostles, p. 158.

* * * * * *

Q. Whereabouts was she—[the *Wolverton*]—in the river [when you saw her]? A. She must have been somewhere near the middle of the river.

Q. On which bow of the tug was she? A. The starboard bow.

671 Q. Which way did she seem to be heading? A. Heading across—very near Pier 1, East River.

Libellant's Testimony, p. 74.

672

Depositions of Libellant on Appeal to the United States Circuit Court, 673

SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY LIGHTERAGE COMPANY

AGAINST

The Steamtug "E. A. PACKER," &c.

674

EXAMINATION of BENJAMIN P. HANSELL, taken pursuant to notice, as a witness for libellant.

Present—Proctors for both parties.

The witness, having been first duly sworn, testifies:

I have been engaged in the towing business thirty-eight years, about. I mean, have had charge of steam towing vessels that number of years. I have been towing in and about the harbor of New York all that time.

During that time it has been my business to tow 675
vessels from the East River to the North River, and from the North River to the East River for the past twenty-one years constantly. I have towed at all times and all tides, day and night; have towed vessels alongside and on hawsers, and I am pretty well acquainted with the navigation around the Battery.

Q. In towing vessels from the North river into the East River when there is a strong ebb tide in the East River, and if you are meeting vessels coming from the East River to the North River, do you always go on the same side of them? A. No, sir.

676 Q. What determines which side of those vessels you pass them? A. That depends upon the circumstances of each case when we meet vessels, sometimes pass on one side and sometimes on the other.

Q. Do you know the line which the ebb tide takes from the end of the East River piers? A. No; I don't think I can answer that.

Q. Is not the line of the strength of the ebb tide clearly defined from the ferry slips westward? A. Yes, sir; the line between the ebb tide and the slack water.

Q. How far out from the Barge Office is the edge of the ebb tide, when the tide is strong? A. It is four hundred feet at least, it might be more.

677 Q. Assume that a tug was coming from the North River having a barge with three hundred and twenty-five or three hundred and seventy-five tons of coal alongside on the port side, that she was coming at a rate of speed which when going against the strength of the ebb tide in the East River, would carry her not faster than two miles an hour, assume that she came around the Battery at a distance of three or four hundred feet from the Battery, with her helm a little a port, enough to keep the barge steady; when she reached the line of the ebb tide with her helm in that way, what would be the effect of the ebb tide upon her? A. If she strikes into the tide, with the tide on that port bow, the tide would
678 sweep her away, carry her down before she could recover herself; she would lose something.

Q. How far, in your experience, do you say she would go out into the ebb tide before she could get headed directly against it? A. I should judge the full length of the vessel herself; of course I understand in the case like that, that she strikes the tide so that the force of the tide strikes her on the port bow as she comes out of the slack water.

THOMAS L. MORRIS, being duly sworn, deposes and says: 679

I live in Jersey City; I am a captain and pilot of tugboats; have been in that business twenty-three years in the harbor of New York; I have been in the habit of towing vessels from the North River and from the East River around the Battery, all kinds of vessels and at all times of the tides, every day for that matter, except Sundays; I was eleven years and a half in the employ of Shortland & Co.

Q. When the tide is at the strength of the ebb in the East River, how far off abreast of the Barge Office is the line between the ebb tide and the eddy, there being no wind to speak of? A. Well, from 300 to 350 feet I should judge. 680

Q. How do the vessels coming out of the North River into the East River—steam vessels—and vessels coming from the East River into the North River pass each other in the neighborhood of the Barge Office, that is, vessels towing other steam vessel? A. I follow the Battery around from the East to the North River, from the North to the East, follow the North River tide around until I open the piers by the Barge Office, and then edge into the eddy.

Q. This you speak of what you do yourself and what you have seen other vessels do? A. Yes, sir.

Q. And is there any universal rule as to which side of each other they pass? A. No; none as I know of. 681

Q. Upon what does it depend upon which side they pass? A. It depends upon which way you are going—the tide has something to do with it. If you are going from the East to the North it is customary to pass close in, passing the other on my port hand.

Q. Suppose that a tug was coming around from the North River into the East River, having a barge with 375 tons of coal aboard, alongside on the port side of the tug; that she was coming at a rate of speed which, when going against the strength of the

682 ebb tide in the East River, would carry her not faster than two miles an hour; suppose that she came around the Battery at a distance of 300 or 400 feet off with her helm a little aport—enough to keep the barge steady—under those circumstances, when she reached the line of the ebb tide with her helm that way, what would be the effect of the strength of the ebb tide upon her? A. Be apt to carry her off a little—her helm a port.

Q. How much would she be carried off before she could straighten herself up so as to head against the ebb tide? A. Well, that is a pretty hard question to answer—it would depend upon what kind of a boat you would have; a small tug she would go
683 farther.

Q. Do you know the tug *E. A. Packer?* A. Yes, sir.

Q. How far do you say the *E. A. Packer* would be carried off under these circumstances?

Objected to.

A. She might go, I should judge, from 75 to 100 feet before she straightened up again.

Q. Supposing the *E. A. Packer*, with such a barge, had come around the Battery in that way; had come into the ebb tide in that way, and had got straightened up against the ebb tide, could any one tell from her position or heading whether she had
684 come round from the North River or come directly over from Bedloe's Island? A. No, sir.

CROSS-EXAMINATION:

I am now in command of the tug *B. M. Freligh.*

Q. Suppose you are going around the Battery, from the North into the East River, when the tide is running out of the East River strong and full, and you have a heavy tow lashed to your port side, how near the Barge Office would you go in making the turn? A. I should judge in the neighborhood of

300 feet, and such is the almost invariable custom, I should say. 685

Q. In the same circumstances, how far would you go from the end of Pier No. 1? A. About 200 feet —I should try to keep in the eddy.

Q. Suppose when 300 feet off the Barge Office, in just such circumstances, you see another tug 700 feet away coming down from Roberts' Stores, on the full tide, and pointing for about Communipaw Ferry, so that she—this other tug—would, if she kept on her course, pass the Barge Office 700 feet off, what would you do?

Objected to.

A. It would be a time when something would have to be done very quick. I should blow my whistle. If I was on the boat that was going up into the East River I should keep my course. 686

Q. Would you go inside or outside? A. That would depend upon what signal was blown.

Q. What signal would you give? A. Well, it would depend upon the signal the other man gave.

Q. Suppose the other man gave no signal at all? A. I should blow two whistles.

Q. What would that mean? A. That I would pass to my left; in other words, I would keep inside.

Q. What would you do if you were on the tug that was going with the tide? A. I should blow as he blowed, if I could go that way. 687

Q. Well, don't vessels that meet each other in that way—one going up the East River and the other coming down—on the full tide pass each other in that way? A. Not always.

Q. Do they generally? A. Well, I don't know—six of one and half a dozen of the other.

Q. Do you mean to say that a loaded tow, which is already in the eddy, should port her helm and go to the right when meeting a vessel when that is already 300 feet further out in the tide than the loaded tow is? A. If a signal is blown and they are 700 feet away it is her place to go on the outside.

688 Q. What signal? A. One whistle—port the wheel.

Q. Suppose that the tug which is coming down on the ebb tide has a tow on a hawser 300 feet long and that she is quartering the tide, what then?

Question withdrawn.

REDIRECT:

Q. You were asked by Mr. McCarthy as to how near the Barge Office you would go in coming around from the North River into the East River, and how near to Pier No. 1; in answering those questions, did you assume that the river was clear of vessels and that there was nothing in your way? A. I assumed everything clear.

689 Q. You were asked by Mr. McCarthy as to what you would do if you, being three hundred feet off of the Barge Office, saw another tug coming so as to pass the Barge Office 700 feet off. Under those circumstances would not the tug that would pass the Barge Office 700 feet off, pass far astern of the other tug?

Objected to as leading.

A. Certainly she would.

The foregoing testimony is objected to by the counsel for the claimant, because it was taken on so late an occasion, and because it is cumu-
690 lative.

WALTER L. SCHULTZ, being duly sworn, deposes and says:

I was examined on the trial in this case in the District Court.

Q. Was there any other tug in the river at the time of this collision, anywhere between the *Packer* and Governor's Island? A. There was none to bother the movements of the *Packer* or the *Wolverton*.

Q. Was there any other tug in the direction of

Bedloe's Island that you could have mistaken for the *Packer* at any time? 691

Objected to as leading; also that the witness has testified to the subject before.

A. No; there was none.

Q. When you first noticed the *Packer* was she in the ebb tide or in the eddy?

Objected to, because the witness has already sworn to that point.

Q. She was in the edge of the eddy, between the true tide and the eddy.

Q. And how was she heading with reference to the tide? A. Right up against the tide.

Q. Do you know of any prevailing custom in navigating around the Battery where a tug and tow coming from the North River and another tug and tow is coming from the East River, as to which side of each other they shall pass? A. A vessel going with the tide has the right of way; a vessel going against the tide gives way; always pass to the right without a whistle—without something is in the way. 692

Q. How much sooner would it have been necessary for the *Packer* to have given you a signal of two whistles for that signal to have been in time to enable you to have passed under her stern? A. Well, probably two minutes.

693

CROSS-EXAMINED by Mr. McCarthy:

Q. You are the Mr. Schultz that testified in the District Court? A. I am.

WALTER L. SCHULTZ.

Claimant's Exhibit A, December 4, 1887, is admitted in evidance.

The testimony in this record marked in brackets was in evidence before the United States Supreme Court on claimant's appeal from the decree of the United States Circuit Court.

694 The counsel for the claimant thereupon proposed the following findings of fact and conclusions of law to be found by the Court:

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY LIGHTERAGE COMPANY,
Appellant,

vs.

The Steamtug "E. A. PACKER,"
695 &c.,
Appellee.

Proposed Findings of Fact on the part of the Respondent.

FIRST.

This collision occurred off Pier 1, Battery, in the middle of the afternoon of October 25, 1880.

At the time of the collision the tide was running strong ebb out of the East River.

SECOND.

696 The steamtug *Packer*, having a heavy tow lashed to her port side, was, prior to the collision, slowly steaming around the Battery and heading up into the East River on a compass course of about east by north or east northeast. She steamed around the Battery and passed the new Barge Office, about 300 feet away, it being her intention to keep well in the slack water of the ebb tide while getting into the East River. Her course was heading up into the East River more and more as she went along. Her speed past the land was not more than two miles per hour.

THIRD.

697 The steamtug *Wolverton* was at or about the same time crossing the mouth of the East River from a point at or near Roberts' Stores, Brooklyn. She was hauling on a hawser the barge *Atlanta*, owned by the libellant, and the length of the hawser between the tug and tow was not less than 150 feet. From the stem of the tug *Wolverton* to the stern of the barge *Atlanta* was a distance of at least 300 feet.

After leaving Roberts' Stores, Brooklyn, the course of the tug *Wolverton* was about west by north, and if held unchanged would have brought up at a point below Communipaw dock, Jersey City, and would have cleared the new Barge Office and the Battery 600 or 700 feet. The *Wolverton*, with the assistance 698 of the tide, was making seven to eight miles an hour.

FOURTH.

As the tugs approached each other each had the other on her own starboard bow. Their courses were nearly parallel and such that they would have cleared each other by 200 feet or more if the *Wolverton* had held her course unchanged.

The *Wolverton* was observed by the *Packer* when at a distance of 500 yards or more. She, the *Packer*, then blew two blasts of her whistle, which signified that she would keep inside. The *Wolverton* made no reply whatever to this signal.

699 The *Wolverton* kept on her course with undiminished speed until she was about 200 feet from the *Packer*, when she suddenly ported her wheel and took a rank sheer of four or five points to the right, bringing herself and her tow directly across the *Packer's* bow. This manœuvre was the proximate cause of the collision which followed. The *Wolverton* herself, because of her high speed, escaped both the *Packer* and her tow, but the barge *Atlanta* being so far behind the *Wolverton*, was unable to do so. A collision followed between the port side of the barge *Atlanta* and the bow of the *Packer's* tow.

700 As a conclusion of law I find that the tug *Wolverton* was wholly in fault, and that this libel was properly dismissed in the Court below.

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY LIGHTERAGE COMPANY,
Libellant,

701 vs.

The Steamtug "E. A. PACKER," her Engines, etc., John Scully,
Claimant.

Proposed Additional Findings of Fact submitted by the Claimant.

FIRST.—From and after the moment when the two tugs saw each other the course of the *Wolverton* up till the instant when she ported her wheel was a straight line from Roberts' Stores, Brooklyn, to a
702 point just below Communipaw dock, New Jersey, being about in the middle of the river, when opposite Pier 6, New York, and clearing Piers 2 and 1 by five hundred (500) or six hundred (600) feet and clearing the Barge Office on the Battery by one hundred and seventy-five (175) feet more. Her course by compass was west by north (see fols. 324 to 340 and fol. 368).

SECOND.—The tugs *Wolverton* and *Packer* were at no time approaching, each having the other on her own port bow (fol. 382).

THIRD.—Up to the time when the *Wolverton* ported her wheel she had not been at any time going parallel with the line of the ends of the New York piers. From Roberts' Stores she bore on to Pier Two, crossing the river to westward and northward, going so nearly with the tide and so little across it that there was no perceptible sag to her hawser barge (fols. 386–388). 703

FOURTH.—The half ebb tide of the East River sweeps straight down towards Buttermilk channel until it gets abreast of South Ferry, and then it strikes Governor's Island (fol. 383).

FIFTH.—When the tug *Wolverton* saw the tug *Packer* she (the tug *Packer*) was headed straight up the East River and the two tugs were not then approaching each other head on (fol. 312). 704

SIXTH.—The porting of the *Wolverton's* wheel when she was about 200 feet from the *Packer* was a change of four or five points from her course (fol. 295).

SEVENTH.—The place of collision was about 200 feet off from the South Ferry pier (fol. 344).

EIGHTH.—The whistles that were blown by the *Packer* when she saw the *Wolverton*, were heard but not answered by the latter. 705

I decline to find otherwise than I have already found, except that I find the compass course of the tug *Dr. Wolverton* to have been west northwest instead of N. W. by N. as originally made to appear by mistake.

Libellant's Exhibit A, marked this day, is admitted.

New York, Dec'r 4, 1886.

WM. J. WALLACE.

706 The said Circuit Judge thereafter and after time taken for consideration filed with the Clerk of the said Circuit Court his opinion, and also filed with said Clerk the following findings of fact and conclusions of law:

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY LIGHTERAGE COMPANY

vs.

707 The "E. A. PACKER," &c.

WALLACE, *J.*—The testimony in this case is unusually conflicting upon all material questions, and it will not be profitable to attempt to review the statements of the witnesses in detail or to elaborate the reasons for the conclusion which has been reached. The only theory of the facts which is consistent with the answer of the *Packer* and can be reconciled with the testimony of her pilot as first given and of her witnesses, James E. Purnell and Firman, is that the *Packer* came around the Battery
708 about 200 yards off; had struck the ebb tide, which swung her further off; was making up the East River in a line somewhat parallel with the end of the piers, but swinging in against the tide towards them, and was about opposite Pier 1 when she saw the *Wolverton*. The *Wolverton* was at that time about 500 yards off, making across the river, heading from a point somewhat below the Wall Street Ferry on the Brooklyn side for a point above Pier No. 1, calculating to be carried, with her tow, by the force of the eddy off the Battery, but as near as she could go on a direct line for Communipaw

Ferry. Both vessels saw each other about the same time, and when they first saw each other the *Packer* had the *Wolverton* on her starboard bow and the *Wolverton* had the *Packer* on her port bow. The vessels were then on courses crossing each other and converging towards the New York shore, and it was the duty of the *Packer*, under the XIX. rule of navigation, to keep out of the way. Her pilot wanted to save delay and escape encountering the greater force of the tide by keeping in towards the the ends of the piers instead of going out. He was a very ignorant pilot and relied upon a practice which prevails to a considerable extent for tows coming around the Battery near the shore to hug the shore. 709 710

The proofs show that when tows are swinging around the Battery into the East River from the North River they generally try to go within a couple of hundred feet of the shore, and when they keep within that distance approximately the right is very generally accorded to them by tows coming around the Battery from the East River to keep inside; but no practice is shown prevailing with that uniformity which is requisite to a usage applicable to the situation between the vessels here or which justified the pilot of the *Packer* in insisting upon the right of keeping inside. Relying partly upon the alleged usage and partly upon the supposition that the *Wolverton* would accord him the inside if signalled to do so, the pilot of the *Packer* immediately upon signaling by two blasts of his whistle put his wheel to starboard, thus bringing his boat nearer to the New York shore and aggravating the chances of a collision. 711

Inasmuch as the liable filed against the *Wolverton* was dismissed by the District Court of the United States for the Eastern District of Pennsylvania—that Court adjudged the *Wolverton* free from fault—it is not necessary to consider the question whether upon the proof here both tugs were in

712 fault. It suffices that the libellant is entitled to recover against the *Packer*.

A decree is ordered for the libellant, with a reference to a commissioner to assess the damages, with cost of this Court and of the District Court.

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY LIGHTERAGE
713 COMPANY,
Appellant,

vs.

The Steam Tug "PACKER,"
Appellee.

Upon this appeal the following facts are found:

FIRST.— That on the 25th day of October, 1880, the libellant was the owner of the barge *Atlanta* and was a common carrier of a cargo on said barge, as alleged in the libel.

714

SECOND.—That on that day, in the afternoon, a collision occurred between said barge and the barge *Cross Creek* No. 5, then in tow of the steamtug *Packer*.

THIRD.—That the barge *Atlanta* and her cargo were on that day taken in tow by the steamtug *Wolverton* at Roberts' Stores in the East River, to be towed to Long Dock, Jersey City, and were towed astern of said tug by a hawser of one hundred and fifty feet in length between the tug and barge.

FOURTH.—That on that day the tug *Packer* was bound from the North River into the East River, having in tow on her port side the barge *Cross Creek* No. 5, loaded with about 450 tons of coal, the barge projecting beyond the bow of the tug. 715

FIFTH.—As the *Wolverton*, with her tow, was crossing the mouth of the East River the *Packer* with her tow, was heading around the Battery into the East River, passing the New York shore opposite the Barge Office, nearly two hundred yards away.

SIXTH.—That the tide in the East River was ebb and about at full strength. The *Wolverton* and her tow were going with the tide about seven miles an hour and the *Packer* and her tow were proceeding against the tide at a speed of about two miles an hour. 716

SEVENTH.—That the *Packer* and her tow had come so far around from the North River before seeing the *Wolverton* as to be in the ebb tide coming out of the East River, and when she saw her was heading up against that tide and was about two hundred yards out from the shore opposite the Barge Office.

EIGHTH.—The vessels saw each other when about 500 yards apart, and at that time the course of the *Wolverton* was about N. W. by N.* and the course of the *Packer* was E. by N., and as they approached each other the *Packer* had the *Wolverton* on her starboard bow and the *Wolverton* had the *Packer* on her port bow, the *Wolverton* being further out in the river from the New York shore than the *Packer*, and the vessels being upon crossing courses converging towards the New York shore. 717

NINTH.—As soon as the *Packer* saw the *Wolverton* she blew two blasts of her steam whistle. She was

* Original finding changed. "W. N. W." instead of "N. W. by N."—W. J. W.

718 then under a starboard wheel and making in somewhat towards the end of the piers, but upon signaling the *Wolverton* she starboarded her wheel still more. The *Wolverton* made no reply to the *Packer's* signals, but kept on her course without abating speed until within about 200 feet. The *Packer* then blew two more whistles and reversed her engines and the *Wolverton* ported her wheel. The *Wolverton* passed the bow of the *Packer* and her tow, but the libellant's barge was unable to do so, and her port side came in collision with the bow of the *Packer's* tow.

TENTH.—At the time the *Wolverton* ported her wheel danger of collision was imminent and a collis-
719 ion seemed unavoidable.

ELEVENTH.—There was nothing in the river to interfere with the navigation of either vessel. The collision occured about 400 or 500 feet off the ends of the piers and just below the slip of the South Ferry.

TWELFTH.—There was no local usage of navigation applicable to the situation of the vessels when they discovered each other.

THIRTEENTH.—That between the tide of the East River and the North River there is an eddy which extends out about 400 feet from the Barge Office, and the *Packer* had passed through this eddy and
720 reached the ebb tide, which struck on the port bow of her tow and swung the vessels still further off shore before her pilot saw the *Wolverton*.

FOURTEENTH.—The libellant's barge was in all respects properly navigated. By reason of the collision the barge and cargo sustained serious injury.

The following conclusions of law are found:

FIRST.—The two tugs being on crossing courses, it was the duty of the *Packer*, having the *Wolverton*

on her starboard hand, to keep out of the way, and the duty of the *Wolverton* to keep her course. 721

SECOND.—It was the duty of the *Packer* to port her wheel and stop and reverse her engine in time to avoid the collision.

THIRD.—The libellant is entitled to recover against the *Packer* the damages sustained by the collision.

Filed July 14, 1886.

Endorsed—U. S. Circuit Court, Southern District of New York.—The New Jersey Lighterage Company, Appellant, *vs.* The Steamtug *Packer*, Appellee.—Copy Findings. 722

To which findings of the Circuit Judge the claimant duly filed the following exceptions:

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY LIGHTERAGE COMPANY,
Libellant,

vs. 723

The Steamtug "E. A. PACKER," &c., John Scully,
Claimant.

EXCEPTIONS OF CLAIMANT TO THE FINDINGS OF FACT AND CONCLUSIONS OF LAW HEREIN OF THE CIRCUIT COURT:

FIRST EXCEPTION.—The claimant and appellant excepts to so much of the seventh finding of fact as

724 holds that the tug *E. A. Packer* was two hundred yards out from the shore when she saw the *Wolverton* and that she, the *E. A. Packer*, was heading against the tide.

On this subject the weight of testimony is that the tug *E. A. Packer* was not more than one hundred yards out, while the undisputed testimony is that she was still in slack water.

SECOND EXCEPTION.—The claimant and appellant excepts to the eighth finding of fact only in so far as it holds that the two tugs were approaching on crossing courses converging towards the New York shore, the *Packer* having the *Wolverton* on her own
725 starboard bow and the *Wolverton* heading west northwest. The ground of this exception is that the finding is unsupported by any testimony whatsoever. The tugs were not on courses crossing ahead and converging towards the New York shore. The course of the tug *Wolverton* was west and not west northwest. Their courses would not have crossed had not the *Wolverton's* course been changed.

This appellant excepts to so much of the eighth finding of fact which holds that the *Wolverton* was further out in the river from the New York shore than was the *E. A. Packer*.

THIRD EXCEPTION.—This appellant excepts to the whole of the tenth finding of fact on the ground that
726 this finding is contrary to all the evidence in the case.

FOURTH EXCEPTION.—This appellant excepts to so much of the eleventh finding of fact as holds that the place of collision was four hundred or five hundred feet off the ends of the piers.

The ground of this exception is that the testimony of both sides agrees in making the place of collision not more than two hundred feet from the end of Pier One.

FIFTH EXCEPTION.—This appellant excepts to the whole of the twelfth finding of fact. The ground of

this exception is that the finding is contrary to the testimony of either party. 727

SIXTH EXCEPTION.—This appellant excepts to the thirteenth finding of fact. The ground of this exception is that the finding is contrary to fact.

SEVENTH EXCEPTION.—This appellant excepts to every one of the conclusions of law. To the first conclusion because (1) the two tugs were not approaching on crossing courses; or, (2) if they were, then the duty of the *E. A. Packer* to keep out of the way was faithfully observed by her, but the *Wolverton* failed to keep her course and caused the collision.

To the second conclusion of law (I.) because if the two tugs were approaching on crossing courses it was the duty of the *Packer* to starboard, not to port, her wheel; and (II.) it was her duty not to stop and reverse, and there was no need for her to do so if the *Wolverton* held her course. 728

EIGHTH EXCEPTION.—The findings of fact do not sustain the conclusions of law.

These findings show that the *Wolverton* was further out in the river than was the *E. A. Packer*; that she, the *Wolverton*, was going rapidly with the tide, having a tow swinging her on a long hawser; that the courses were not crossing ahead, but were starboard to starboard; that the collision was solely produced by the *Wolverton's* porting her wheel and going across the bows of the *E. A. Packer* when she, the *Wolverton*, was too near the *Packer* to attempt such manœuvre with safety; that if on any construction it was the duty of the *Packer* to keep out of the way she, the *Packer*, properly discharged that duty by giving a blast of two whistles and starboarding her wheel. 729

This appellant insists that the sole proximate cause of the collision was the rank and sudden sheer of the *Wolverton* across the *Packer's* bows.

730 NINTH EXCEPTION.—This appellant also excepts because the Circuit Judge refused to make the first proposed finding of fact submitted by the appellant.

The ground of the exception is that the said proposed finding is based on and supported by the testiment of the libellant's chief witness, to wit, the pilot of the tug *Wolverton*, and is not contradicted or impugned by any testimony whatsoever.

Moreover, the facts contained in the said proposed first finding are conclusive in their character and strictly determine the question as to whether or not the tugs were on courses crossing ahead and converging towards the New York shore.

731 TENTH EXCEPTION.—This appellant excepts to the refusal to make the third proposed finding of fact submitted by the appellant.

The ground of this exception is that the said proposed finding is supported by the testimony of the libellant's witness, the pilot of the *Wolverton*, and is contradicted or impugned by no other witness.

ELEVENTH EXCEPTION.—This appellant excepts to the refusal of the Court to make the fourth proposed finding of fact.

The ground of this exception is the same as that on which the last exception was placed.

732 TWELFTH EXCEPTION.—This exception is to the refusal of the Court to make the fifth proposed finding of fact submitted by this appellant.

THIRTEENTH EXCEPTION.—This exception is to the refusal of the Court to make the sixth proposed finding of fact submitted by the appellant.

The ground of this exception is that the fact contained in this proposed finding is of the utmost importance and determines the whole controversy, to wit, that the tug *Wolverton* did, when she was about two hundred feet away from the *Packer*, change

her course by four or five points. It is a fact maintained and supported by the testimony of the libellant's chief witness, the pilot of the tug *Wolverton*, and is not contradicted or impugned by any other testimony. 733

FOURTEENTH EXCEPTION.—This exception is to the refusal of the Court to make the seventh proposed finding of fact submitted by this appellant.

The ground of this exception is that the said proposed finding is supported by all the testimony alike of the libellant and the respondent.

N. Y., Dec. 29, 1886.

EDWARD D. MCCARTHY,
Proctor for Claimant. 734

Endorsed—Filed Dec. 31, 1886.

735

736 That thereafter the said Court made its final decree as follows:

At a Stated Term of the Circuit Court of the United States of America in and for the Southern District of New York, in the Second Circuit, held at the Court Rooms, in the City of New York, on the fourth day of December, 1886.

Present—The Honorable WILLIAM J. WALLACE, *Circuit Judge.*

737 THE NEW JERSEY LIGHTERAGE COMPANY,
Libellants and Appellants,

vs.

The Steamtug "E. A. PACKER," her engine, &c., John Scully, Claimant and Appellee.

738 An interlocutory decree having been made herein on the 16th day of July, 1886, whereby it was ordered and adjudged that the decree of the District Court made and entered herein on the 13th day of May, 1884, be in all things reversed, and that the libellants, The New Jersey Lighterage Company, recover the damages by them sustained by reason of the collision in the libel mentioned, with costs to be taxed, and that it be referred to a Commissioner of this Court to ascertain and compute such damages, *deed* such damages having been fixed by consent at the sum of thirty-nine hundred and fifty-four $\frac{48}{100}$ dollars, with interest thereon from the 25th day of October, 1880, to date, and the libellants' costs having been taxed at the sum of two hundred

and seventeen $\frac{43}{100}$ dollars for the District Court and 739
the sum of four hundred and twenty-six $\frac{35}{100}$ dollars
for the costs of this Court;

Now, on motion of Benedict, Taft & Benedict, libellants' proctors,

It is ordered, adjudged and decreed by the Court, that the libellants, The New Jersey Lighterage Company recover of the steamtug *E. A. Packer*, her engine, &c., the said sum of thirty-nine hundred and fifty-four $\frac{48}{100}$ dollars, together with the sum of fourteen hundred and forty nine $\frac{88}{100}$ dollars, interest thereon from October 25, 1880, to date, amounting to the sum of fifty-four hundred and four $\frac{31}{100}$ dollars for their damages, and also the sum of six hundred and forty-three $\frac{78}{100}$ dollars, their costs as taxed, amount- 740
ing in all to the sum of six thousand and forty-eight $\frac{09}{100}$ dollars, and that the said steamtug be condemned therefor.

And it is further ordered and adjudged, that the stipulators for damages and costs cause the engagement of their stipulations to be performed.

And it is further ordered and adjudged, that unless an appeal be taken from this decree within the time limited by law and prescribed by the rules and practice of this Court the libellants have execution to enforce satisfaction of this decree.

WM. J. WALLACE.

Endorsed—Filed Dec. 4, 1886. 741

From which decree the said claimant duly appealed to the Supreme Court of the United States.

742 UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

Whereas, lately in the Circuit Court of the United States for the Southern District of New York, before you, or some of you, in a cause between The New Jersey Lighterage Company, libellant and appellant, and the steamtug *E. A. Packer*, her engines, &c., John Scully, claimant and appellant, to have the de-
743 cree of said Circuit Court entered in said cause on the 4th day of December, A. D. 1886, in the following words, viz.:

"An interlocutory decree having been made herein on the 16th day of July, 1886, whereby it was ordered and adjudged that the decree of the District Court made and entered herein on the 13th day of May, 1884, be in all things reversed, and that the libellant, The New Jersey Lighterage Company, recover the damages by them sustained by reason of the collision in the libel mentioned, with costs to be taxed, and that it be referred to a Commissioner of this Court to ascertain and compute such damages; and such damages having been fixed by consent at the sum of
744 thirty-nine hundred and fifty-four $\frac{48}{100}$ dollars, with interest thereon from the 25th day of October, 1880, and the libellant's costs having been taxed at the sum of two hundred and seventeen $\frac{43}{100}$ dollars for the District Court, and the sum of four hundred and twenty-six $\frac{35}{100}$ dollars for the costs of this Court; Now, on motion of Benedict, Taft & Benedict, libellants' proctors, it is ordered, adjudged and decreed by the Court, that the libellants, The New Jersey Lighterage Company, recover of the steamtug *E. A. Packer*, her engines, &c., the said sum of thirty-nine hundred and fifty-four $\frac{48}{100}$ dollars, together with the sum of fourteen hundred and forty-nine $\frac{43}{100}$ dollars

interest thereon from October 25, 1880, to date, 745
amounting to the sum of fifty-four hundred and four $\frac{11}{100}$ dollars for their damages, and also the sum of six hundred and forty-three $\frac{75}{100}$ dollars, their costs as taxed, amounting in all to the sum of

dollars, and

that said steamtug be condemned therefor.

"And it is further ordered and adjudged, that the stipulators for damages and costs cause the engagements of their stipulations to be performed.

"And it is further ordered and adjudged, that unless an appeal be taken from this decree within the time limited by law and prescribed by the rules and practice of this Court the libellants have execution to enforce satisfaction of this decree, as by the inspection 746
of the transcript of the record of said Circuit Court of the United States by virtue of an appeal according to the act of Congress in such case made and provided.

WM. J. WALLACE."

And whereas, in the past Term of October, in the year of our Lord one thousand eight hundred and ninety, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel.

On consideration whereof, it is hereby ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be and the 747
same is hereby reversed with costs; and that the said claimant and appellee, John Scully, recover against the said libellant and appellee one hundred and fifty-seven dollars for his costs herein expended, and have execution therefor.

And it is further ordered that this cause be and the same hereby is remanded to the said Circuit Court with directions to proceed therein in conformity with the opinion of this Court.

May 11, 1891.

748 You, therefore, are hereby commanded that such execution and proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 29th day of May, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of
the United States.

749 COSTS OF CLAIMANT AND APPELLEE.

Clerk	$63 00
Printing record	74 00
Attorney	20 00
	$157 00

Endorsed—Filed June 4, 1891.

750

751 At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, held at the United States Court Room, in the City of New York, on the 7th day of July, in the year of our Lord one thousand eight hundred and ninety-one.

Present—Hon. SAMUEL BLATCHFORD,
Circuit Judge.

752 THE NEW JERSEY LIGHTERAGE COMPANY,
Libellant,

AGAINST

The Steamtug "E. A. PACKER," her engines, &c., impleaded with the Steamtug *Dr. John Wolverton*, her engines, &c., whereof John Scully is
Claimant.

753 The claimant, John Scully, owner of the above named steamtug *E. A. Packer*, having duly appealed to the Supreme Court of the United States from the final decree of the Circuit Court of the United States for the Southern District of New York, entered herein in the office of the Clerk of said Circuit Court, on the 4th day of December, 1886, in favor of the libellants and against the said steamtug *E. A. Packer*, her engines, &c., and for $5,404.31 damages, and $643.78 costs of the District Court and of said Circuit Court, and reversing the decree of the said District Court, entered on the 13th day of May, 1884, in favor of the claimant, John Scully, and against the libellant, and for $140.33 costs, and the

754 said Supreme Court having duly heard and considered claimant's said appeal from the said final decree of said Circuit Court, and duly issued its mandate directed "To the Honorable, the Judges of the Circuit Court of the United States for the Southern District of New York," dated the 29th day of May, 1891, and now on file in this Court, whereby it appears that on the 11th day of May, 1891, upon said claimant's appeal,

Ordered, adjudged and decreed by the said Supreme Court, that the decree of the said Circuit Court in this cause be reversed with costs, and that the said claimant and appellee, John Scully, recover against libellant and appellant one hundred and fifty-seven
755 dollars for his costs herein, expended, and have execution therefor; and that this cause be remanded to the said Circuit Court, with directions to proceed therein in conformity with the opinion of said Supreme Court.

And it also appearing that by the terms of said mandate it was further commanded that such execution and further proceedings be had in this cause in conformity with the opinion and decree of said Supreme Court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding;"

Now, on motion of Edward D. McCarthy, Esq., proctor for said claimant, it is

756 Ordered, adjudged and decreed, that such execution and further proceedings be had herein in conformity with the opinion of said Supreme Court as according to right and justice and the laws of the United States ought to be had.

It is further ordered, adjudged and decreed, that said John Scully, claimant, recover of the libellant and its stipulator or stipulators, the said sum of $157, costs as taxed in said Supreme Court, and that in pursuance of the terms of their stipulation the stipulators for libellant's costs and damages, and costs on appeal pay into Court the said sum of one hundred and fifty-seven dollars, and summary judgment is

hereby entered against them therefor; and that upon 757
said payment thereof the Clerk of this Court distribute the proceeds in satisfaction of the taxed costs of claimant herein.

In default of such payment into Court within ten days as hereby directed, execution may issue against the goods, chattels, lands and credits of said stipulators.

Sgd. SAMUEL BLATCHFORD.

Endorsed—Filed July 7, 1891.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK. 758

THE NEW JERSEY LIGHTERAGE COMPANY,
Libellant and Appellant,

AGAINST

The Steamtug "E. A. PACKER," her engines, &c., John Scully,
Claimant and Appellee. 759

Claimant's sixth proposed finding of fact heretofore submitted upon the former hearing of this appeal in this Court, is again presented pursuant to the decision of the United States Supreme Court on the appeal herein.

SIXTH.—The porting of the *Wolverton*'s wheel, when she was 200 feet from the *Packer*, was a change of four or five points from her course.

I so find. Wm. J. Wallace, Circuit Judge.

760 Claimant's proposed Conclusion of Law:

I.—That the tug *Wolverton* was wholly in fault, and that the libel herein was properly dismissed in the Court below.

Declined.

Endorsed—Filed Feb. 18, 1892.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY LIGHTERAGE COMPANY,
761 Libellants and Appellants,

vs.

The steamtug "E. A. PACKER," her engines, &c., John Scully,
Claimant and Appellee.

Claimant excepts to the Court's refusal to find claimant's proposed conclusion of law offered in the proceedings before the Court, subsequent to the mandate of the Supreme Court of the United States
762 herein, to wit:

I.

That the tug *Wolverton* was wholly in fault and that the libel herein was properly dismissed in the Court below.

And also to the decision of this Court, rendered subsequent to said mandate, that the said tug *Packer* was responsible for the collision.

Dated N. Y., Feb. 20, 1892.

EDWD. D. MCCARTHY,
Proctor for Claimant.

Endorsed—Filed Feb. 20, 1892.

At a Stated Term of the Circuit Court of 763
the United States of America in and for
the Southern District of New York, in
the Second Circuit, held at the Court
Rooms in the City of New York, on the
18th day of February, 1892.

Present—The Hon. WILLIAM J. WALLACE,
Circuit Judge.

THE NEW JERSEY LIGHTERAGE COMPANY,
Libellants and Appellants, 764

vs.

The steamtug "E. A. PACKER," her engine, &c., John Scully, Claimant and Appellee.

Whereas, on or about the 13th day of May, 1884, a final decree was made and entered in this cause in the District Court of the United States for the Southern District of New York, dismissing the libel herein with one hundred and forty and $\frac{33}{100}$ dollars costs;

And whereas, on appeal to this Court from the 765
said final decree, a final decree was made and entered herein on or about the 4th day of December, 1886, whereby it was ordered and adjudged, that the fina decree of the said District Court be, and the same was in all things, reversed, and that the libellant recover herein the sum of six thousand and forty-eight and $\frac{69}{100}$ dollars damages and costs;

And whereas, on appeal to the Supreme Court of the United States from the said final decree, it was by a decree entered herein in this Court on or about the 7th day of July, 1891, on the mandate and opinion of said Supreme Court, ordered that the said de-

766 cree of this Court of December 4, 1886, be reversed, and that this cause be remanded to this Court, with directions to proceed therein in conformity with the opinion and mandate of said Supreme Court, and that further proceedings be had in this cause in conformity with the opinion and decree of said Supreme Court as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding;

And whereas such proceedings have been had in this Court, that this Court has made the finding required according to the opinion and mandate of said Supreme Court, and has directed that the libellant recover the damages by it sustained by reason of the
767 collision in the libel mentioned, with costs:

Now, therefore, on motion of R. D. Benedict, proctor for the libellant, it is ordered, adjudged and decreed by this Court, that the libellant, The New Jersey Lighterage Company, recover of the steamtug *E. A. Packer*, her engine, &c., the sum of three thousand nine hundred and fifty-four and $\frac{48}{100}$ dollars, the damages as agreed to, to save cost of reference, together with the sum of twenty-six hundred and seventy-eight $\frac{32}{100}$ dollars interest thereon, from the 25th day of October, 1880, to date, amounting to the sum of sixty-six hundred and thirty-two $\frac{80}{100}$ dollars, and also the sum of four hundred and twenty-nine $\frac{35}{100}$ dollars, its costs in this Court, and two hundred
768 and seventeen $\frac{43}{100}$ dollars, costs of the District Court as taxed, amounting in all to the sum of seventy-two hundred and seventy-nine $\frac{58}{100}$ dollars, and that said steamtug, her engines, &c., be condemned therefor.

And it is further ordered and adjudged, that unless an appeal be taken from this decree within the time limited by law, the stipulators for damages and costs cause the engagement of their stipulations to be performed, and that the libellant have execution to enforce satisfaction of this decree.

Signed WILLIAM J. WALLACE.

Endorsed—Filed 1892.

CIRCUIT COURT OF THE UNITED STATES, 769

SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY LIGHTERAGE COMPANY,
Libellant and Appellee,

vs.

The Steamtug "E. A. PACKER," her engines, &c.; John Scully, claimant, impleaded with the Steamtug *Dr. John Wolverton*, her engines, &c.,
Claimant and Appellant. 770

We consent that all stipulations for costs and value and bonds on appeal, also notice of taking depositions, certificate of notary as to taking such depositions, and all endorsements, except dates of filing, be omitted from the record herein, and that all opinions be omitted, reference being made to them by book and page in the law reports, as follows: 20th Fed. Rep., p. 327; 140th U. S., p. 360, and 49th Fed. Rep., p. 92. 771

N. Y., , 1892.

Sgd. R. D. BENEDICT,
Liblt.'s Proctor.

E. D. MCCARTHY,
Clmt.'s Proctor.

772 CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY LIGHTERAGE COMPANY,
Libellant and Appellee,

vs.

The Steamtug "E. A. PACKER," her engines, &c., John Scully, Claimant,
773 Claimant and Appellant.

Sirs,—Take notice, John Scully, the claimant herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the final decree entered herein on the 18th day of February, 1892, in the office of the Clerk of this Court.

New York, March 15, 1892.

EDWARD D. MCCARTHY,
Proctor for Claimant.

To ROBERT D. BENEDICT, Esq.,
774 Libellant's Proctor.

JOHN A. SHIELDS, Esq.,
Clerk.

CIRCUIT COURT OF THE UNITED STATES 775

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY LIGHTERAGE COMPANY, Libellant and Appellee, vs. The Steamtug "E. A. PACKER," her engines, &c., John Scully, Claimant and Appellant.	Petition of Appeal.

776

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

The appeal of John Scully, the above named appellant, respectfully shows to the Court: That on or about the 29th day of October, 1880, the above named libellant, The New Jersey Lighterage Company, a corporation, exhibited its libel in the District Court of the United States for the Southern District of New York against the above named steamtug *E. A. Packer*, her engines, &c., John Scully, claimant, impleaded with the steamtug *Dr. John Wolverton*, her engines, &c., in a cause of collision for the recovery of damages alleged to have been sustained by said corporation, claiming over fifty dollars, and praying, among other things, for the reasons set forth in the said libel, that the said steamtugs might be condemned to pay the demands of the libellant, and costs, in said libel mentioned. That no process was issued in said action against the *E. A. Packer*, but, thereafter, and on or about 9th day of December, 1880, the said John Scully appeared in this action as claimant of the said

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778 steamtug *E. A. Packer*, her engines, &c., and filed his claim to said steamtug with a stipulation for value in the sum of $5,000, with interest, and thereafter duly filed his answer to the said libel in the said District Court, praying that the said libel might be dismissed as against the said steamtug *E. A. Packer*, her engines, &c., with his costs in that behalf, as by reference to said libel and answer will more fully appear. That the said steam tug *Dr. John Wolverton* was never since the commencement of this action found within the said Southern District of New York, and never appeared or answered in this action.

That said cause came on to be heard before the Hon. Addison Brown, Judge of the said District
779 Court, on or about the 15th, 16th and 21st days of May, 1883, upon the depositions and proofs taken in said cause, and testimony and proofs adduced by the respective parties, and the said cause was argued by the proctors for the respective parties on or about the 10th day of December, 1883, and briefs were afterwards submitted to said Judge by the said advocates, and the said Judge, having advised thereon, on the 13th day of May, 1884, made a decree in said cause, whereby it was declared and adjudged that the *E. A. Packer* was not at fault for the said collision, and decreed that the said libel against the steamtug *E. A. Packer*, &c., be dismissed, and that the said claimant, John Scully, recover against the said libellant,
780 The New Jersey Lighterage Company his costs, taxed at the sum of $140.33.

That thereafter, and on or about July 7, 1884, the said libellant appealed from the final decree dismissing the libel herein as aforesaid to the Circuit Court of the United States for the Southern District of New York which appeal was duly heard, and the decree so appealed from was reversed by the said Circuit Court, and a decree ordered for the libellant for the full amount of its damages with interest and costs, in all amounting to $6,048.09, and a final decree to that effect was entered in the office of the

Clerk of said Circuit Court, on or about the fourth 781
day of December, 1886.

That your petitioner firmly believing that the said decree of the Circuit Court was erroneous, unjust and contrary to law, duly appealed therefrom to the Supreme Court of the United States, and his appeal was duly argued at the regular October Term of said Supreme Court for the year 1890 (being numbered 286 on the general calendar of said Supreme Court for that Term), and the decree of the said Circuit Court was reversed with costs, because of error on the part of the Circuit Judge, who heard the cause on the appeal from said District Court, and made the decree so appealed from in refusing to make any finding whatever upon claimant's proposed sixth 782
finding of fact, to wit:

"The porting of the *Wolverton's* wheel when she was about 200 feet from the *Packer* was a change of four or five points from her course"; and the said Supreme Court, on or about May 29, 1891, duly issued its mandate herein remanding the cause to the said Circuit Court, with directions to proceed therein in conformity with the opinion of said Supreme Court as by said mandate more fully appears.

That said mandate was thereafter, and on or about June 29, 1891, duly filed in the office of the Clerk of said Circuit Court, and on July 7, 1891, an order or decree, signed by the Hon. Samuel Blatchford, Justice, was entered in the office of the Clerk of the 783
Circuit Court, making the decision and decree of said United States Supreme Court the decree of the said Circuit Court.

That thereafter, and on or about the 14th day of December, 1891, the cause was, on libellant's motion, brought on for argument before the Hon. William J. Wallace, Justice, who had made the decree from which your petitioner had appealed to the Supreme Court as aforesaid, and after argument said Justice took the case under consideration, and thereafter, and on or about the 8th of January, 1892, filed an opin-

784 ion in the cause to the effect that your petitioner's said tug, the *E. A. Packer*, was to blame for said collision and ordered a decree in favor of the libellant, notwithstanding that he also found claimant's said sixth proposed finding of fact, above quoted, as requested by the claimant, but erroneously found as a conclusion of law from the findings of fact herein, that the *E. A. Packer* was at fault for the collision and refused to find that the claimant was entitled to a decree dismissing the libel, with costs, as requested by claimant, to which conclusion of law as found, claimant duly excepted, and he duly excepted also to the refusal of the said Circuit Judge to find the conclusion of law submitted by him, said
785 claimant.

That said Circuit Judge on or about the 18th day of February, 1892, made a final decree herein in favor of libellant and against your petitioner and his said tug for the sum of $7,279.53 damages, interest and costs.

Your petitioner further alleges that the said decree is erroneous, inasmuch as the libellant was not entitled to recover any damages from the said steamtug *E. A. Packer* for said collision, and that the said libel should have been dismissed, with costs, and he presents the following:

ASSIGNMENT OF ERRORS.

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1. That the said Circuit Court has failed to proceed in conformity with the opinion of the said Supreme Court herein as required by its said mandate, by refusing to find as a conclusion of law, that the said steamtug *Wolverton* was solely to blame for said collision, after finding as a fact "that the porting of the *Wolverton's* wheel when she was about 200 feet from the *Packer* was a change of four or five points from her course."

2. That the said Circuit Court did not dismiss the libel against the steam tug *E. A. Packer*.

3. That the Circuit Court found that at the time 787
the *Wolverton* ported her wheel danger of collision was imminent, and a collision seemed unavoidable.

4. That the Circuit Court did not find that it was the custom in the harbor of New York for tows rounding the Battery from the Hudson River into the East River against an ebb tide to keep inshore and in the slack water near the piers.

5. That the Circuit Court held that Rule 24 of Section 4233 of the United States Revised Statutes was not applicable to the relative positions of the *Packer* and the *Wolverton* from and after the time when the two vessels first sighted one another. 788

6. That the Circuit Court held that the porting of the *Wolverton* was a safe manœuvre and must have widened the distance between the *Packer* and the *Wolverton* and her tow.

7. That the Circuit Court held that when the *Wolverton* ported she had the *Packer* on her port bow.

8. That the Circuit Couut held that *Packer* took the most hazardous way of passing the *Wolverton* and her tow.

9. That the Circuit Court held that the stopping and reversing of the *Packer* was a fault. 789

10. That the Circuit Court held that the *Packer* brought the *Wolverton* into a situation when the latter was liable to commit an error of judgment.

11. That the Circuit Court, after the decision and and mandate of the Supreme Court herein, considered evidence not before the Supreme Court.

12. That the Circuit Court held that the *Packer* was in the ebb tide, and not in the slack water at any time after she first sighted the *Wolverton*.

790 13. That the Circuit Court did not hold that the porting of the *Wolverton* produced the collision and that she was solely to blame therefor.

14. That the Circuit Court erred in finding as a matter of law that the *E. A. Packer* was in fault for starboarding her wheel, and that libellants were entitled to a decree.

And this appellant is advised and insists that the said decree was erroneous, inasmuch as it did not decree that the said libel against the said steamtug *E. A. Packer*, &c., be dismissed with costs.

And this appellant, for these and other reasons,
791 feeling aggrieved by said decree appeals from the whole of said decree of the Circuit Court entered herein February 18, 1892, to the United States Circuit Court of Appeals for the second Circuit, and prays that the mandate, record in said Circuit Court including the pleadings, findings of facts and conclusions of law made and filed by said Circuit Court, be sent to the said United States Circuit Court of Appeals without delay, and that said United States Circuit of Appeals will proceed to hear said cause anew, and that the said decree of the Circuit Court and every part thereof, may be reversed, and a decree made dismissing the said libel with costs, and such other decree there-
792 upon made as to the said United States Circuit Court of Appeals shall seem just.

New York, March 15, 1892.

EDWARD D. MCCARTHY,
Proctor for Clmt. and Applt.,
50 Wall Street,
New York, N. Y.

The foregoing appeal is hereby allowed.

New York City, March 31, 1892.

E. H. LACOMBE.

(Endorsed)—Filed March 31, 1892.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA 793

FOR THE SOUTHERN DISTRICT OF NEW YORK,

In the Second Circuit.

THE NEW JERSEY LIGHTERAGE COMPANY, Libellant, vs. The steamtug "E. A. PACKER," her engines, &c., whereof John Scully is Claimant.	Bond for Damages and Costs. 794

KNOW ALL MEN BY THESE PRESENTS, That we, John Scully, principal, and James Cherry and Edward Adamson, sureties, are held and firmly bound unto the above named libellant, The New Jersey Lighterage Company, in the sum of two thousand dollars, to be paid to the said libellant, its successors or assigns, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, 795 jointly and severally, firmly by these presents.

Sealed with our seals and dated the fifteenth day of March, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas, the above-named claimant, John Scully, has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit to reverse the final decree lately rendered in the above entitled suit by the Judge of the Circuit Court of the United States for the Southern District of New York:

796 Now, therefore, the condition of this obligation is such, that if the above named claimant, John Scully, shall prosecute his said appeal to effect and answer all damages and costs and just damages for delay, including interest and cost on the appeal, if he fail to make his said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JOHN SCULLY. [SEAL.]
JAMES CHERRY. [SEAL.]
EDWARD ADAMSON. [SEAL.]

Sealed and delivered and taken and acknowledged this fifteenth day
697 of March, before me.

SEAL. EDWIN B. WOOD,
Notary Public,
Kings Co.
Certificate filed in N. Y. Co.

UNITED STATES OF AMERICA, Southern District of New York, } ss.:

JAMES CHERRY and EDWARD ADAMSON, being severally duly sworn, doth depose and say, and each for himself says: That he resides in the Southern District of New York; that he is worth the sum of four thousand dollars ($4,000), over and above all his debts and liabilities, and that he, said James Cherry,
798 is a freeholder in the City of New York.

JAMES CHERRY.
EDWARD ADAMSON.

Sworn to this fifteenth day of March, A. D. 1892, before me.

SEAL. EDWIN B. WOODS,
Notary Public,
Kings Co.

Certificate filed in N. Y. Co.

Endorsed—Filed March 31, 1892.

BY THE HONORABLE E. HENRY LACOMBE, JUDGE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, 799

TO THE NEW JERSEY LIGHTERAGE COMPANY:

Whereas, John Scully, claimant of the steamtug *E. A. Packer*, her engines, &c., has lately appealed to the United States Circuit Court of Appeals for the Second Circuit, from a decree lately rendered in the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, made in favor of you, the said New Jersey Lighterage Company against the said steamtug, her engines, 800
&c., stating that the said decree is erroneous, and praying that the same be reversed, and having filed the security required by law:

Now, therefore, you are hereby cited to appear before the said United States Circuit Court of Appeals, at the United States Court Rooms in the City of New York, on the 28th day of April next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand and the seal of this Court at the City of New York, in the Second Circuit, this 31st day of March, in the year of our Lord one thousand eight hundred and ninety-two.

SEAL. E. H. LACOMBE.

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UNITED STATES OF AMERICA, } ss
Southern District of New York, }

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one (1) to two hundred and seventy-two (272), inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of The

802 New Jersey Lighterage Company, libellant and appellee, against the steam tug *E. A. Packer*, her engines, &c., John Scully, claimant and appellant, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of August, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the said United States, the one hundred and seventeenth.

JOHN A. SHIELDS,
Clerk.

SEAL.

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OPINION.

BROWN, J.:

The libel in this case was filed to recover damages for the loss of the barge Atlanta which was sunk in a collision with a boat in tow of the E. A. Packer upon her port side, at about four o'clock in the afternoon of October 25, 1880, off Pier 1 or 2 in the East river.

The Atlanta had been lying at Roberts' stores, three piers above the Wall Street Ferry on the Brooklyn side. She was taken in tow by the steamtug Wolverton, on a hawser of about 20 fathoms, and was bound up the North river. The tide was about half ebb and strong. The Wolverton after hauling the Atlanta away from the dock at Roberts' stores, and getting straightened down the East river, was put upon a course heading down and somewhat across the East river towards a point a little below Communipaw on the Jersey side, and so as to clear Pier 1, according to the testimony of Schultz, her pilot, by about 600 feet, and the Battery by about 700 feet. Schultz further testifies that this course was kept unchanged until he heard two whistles from the Packer, when he put his helm hard-a-port and changed his course some four or five points heading in towards the New York shore. The Packer was also headed somewhat towards the same shore. The Wolverton crossed the bows of the Packer, clearing her by some twelve or fifteen feet; but the Atlanta which was about 100 feet astern was struck just forward of amidships on her port side by the tow of the Packer, and speedily sank. Upon a libel filed in the district of the Eastern District of Pennsylvania against the

Wolverton by the master of the Packer's tow to recover her damages arising out of this collision, it was contended on the part of the Wolverton that the two tugs approached each other port to port; that is to say, that the Packer was outside, and further off from the New York shore than the Wolverton, and that the two were on courses which, if kept, would have cleared each other by the Packer's going astern of the Wolverton. The libel in that case was dismissed on the ground, as I understand, that this theory of approach was not disproved. The Wolverton, 13 Fed. Rep., 44.

By the undeniable weight of evidence in this case, that theory is untenable and is proved to be untrue. Of all the witnesses on both sides Capt. Schultz alone maintains it. It is clearly inconsistent with the situation as indubitably established by other proof, and is substantially abandoned by the libellant's counsel.

For the claimants it is contended that the two tugs, at the time when they were first seen to each other and when the first signal of two whistles was given by the Packer, were approaching each other starboard to starboard; that is that the Packer was heading up the East river in the eddy off the barge office, and then being within 200 to 400 feet of the New York shore, while the Wolverton was much further out in the river, heading somewhat quartering across the river, but still downwards and outside of the Packer. The libellants' counsel, though not denying the weight of evidence shows that the Packer had the Wolverton on her own starboard bow, still contends that the Wolverton had the Packer on her port bow, and that the Wolverton had therefore the right of way, and that the Packer was bound to keep out of the way. The testimony on this point is more than usually embarrassing; not merely from the contradictions between different witnesses, but from the inconsistencies, contradictions, and corrections by several of

the most important witnesses on each side in their own testimony. It would not be profitable to point these out in detail; both counsel have sufficiently commented upon them. Almost any theory of the case can be maintained by taking detached portions of the testimony. I shall only state some of the points which I think best established. 7

1. Both the tugs were navigating in violation of the statutes of this State, in passing so near to the Battery; but as they were visible to each other in ample season to avoid the collision, and as there was plenty of room for them to avoid each other where they were, the violation of the statute is not deemed a proximate cause of the accident, and is therefore regarded as immaterial. The Maryland, 19 Fed. Rep., 551, 556. The Fanita, 8 Ben., 11. 8

2. The collision took place between Piers 1 and 2, and probably not over 300 feet off from the latter.

3. The Packer, with a heavy tow on her port side, had come down the North river and rounded within 300 or 400 feet of the Battery, and probably less than that distance, according to the prevailing custom of boatmen, in order to avail herself of the eddy there, intending to pass through this eddy, and to keep close in by the piers beyond. She passed the barge office, probably within 400 feet of it, under a starboard wheel, so as to keep along by the piers, and so as to draw nearer to the longer piers beyond. She was moving slowly, at the rate of not more than a couple of miles per hour by land, while the Wolverton, with a strong ebb-tide, was moving by land at about the rate of eight miles per hour. The two tugs were seen by each other, according to the testimony of the pilots of each, when about 400 or 500 yards apart. Before the collision, the Packer's engines were reversed: and, at the time of the collision she was not probably making any headway. The distance of 400 or 500 yards between the two, when first seen, would be 9

10 passed over in about a minute and a half. During that time the Packer, considering her slow motion and the backing of her engines, during the latter part of this interval could scarcely have made more than about 300 feet progress; and this agrees with her evidence as to the place from which she first saw the Wolverton, viz., off the barge office. The Wolverton did not back at all, but kept on at full speed; and she must have gone during the same time, from 900 to 1,200 feet.

4. In reaching the point of collision from the place where she first saw the Wolverton, it is clear that the Packer could not have much shortened her
11 distance from the New York shore; both because she could not have gone much over 300 feet altogether during the interval, and because in the edge of the slack water, where she then was, the slight ebb tide against her operated to lessen the effect of her starboard wheel. The libellants' counsel contends, even, that through this effect of the ebb tide she was actually heading outwards and away from the shore. This does not accord with the evidence and does not seem to me probable; several of the libellant's own witnesses testified to the Packer's heading in somewhat towards the New York shore. At most, however, the Packer, in passing over some 300 feet could have neared the New York shore
12 but little, although in approaching Pier 2 she would come much nearer to it than to Pier 1, as Pier 2 projects about 75 or 100 feet further out into the water.

5. On the other hand, it is certain, from the testimony of the witnesses on both sides, that the Wolverton, when the Packer was first seen, about 400 or 500 yards distant, must have been far out in the East river, at least one-third of the distance to the Brooklyn shore, and in the full sweep of the ebb tide. That distance back from the place of the collision would place her there.

6. The Wolverton's course, as given by her pilot and wheelsman, would carry her outside of the Packer's line of approach, making them starboard to starboard when first seen. Considering the gross error of the pilot, Schultz, in testifying that the Packer, when first seen, was further out in the river than the Wolverton, that the tugs approached port to port, and that the Packer seemed to have come from the vicinity of Bedloe's Island and not around the Battery, I attach little weight to his evidence on these disputed points. It is not impossible that in his testimony he has confounded the situation of the Packer with that of another tug outside of her; that it was not the Packer which he saw 400 or 500 yards distant, but the other tug more in the direction of Bedloe's Island; and that he did not see the Packer till afterwards, when she was much nearer to him. But there is no reason to discredit his testimony as to the course which he took and kept up to the time of his "rank sheer," after the Packer's whistles. That course, he says, was headed for "a little below Communipaw," after straightening down the river from Roberts' stores. From that point, after straightening down the river, the course testified to, so as to "clear the Battery by some 700 feet," would have brought the Packer upon the Wolverton's starboard bow, unless the Packer were more than 500 feet off from the Barge Office, which was not the case, as the place of collision proves. The Wolverton reached the place of collision only after a sheer of four or five points. She passed the Packer's tow only about twenty feet off, and I regard it as in the highest degree improbable; therefore, when the Packer was first seen, or ought to have been seen, *i. e.*, before the Wolverton ported, that the Packer was, to any appreciable extent, on the Wolverton's port bow. She must have been either on the Wolverton's starboard bow, or nearly ahead, as several of the witnesses testify. Schultz's testimony, that the Packer was at no time

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16 on his starboard bow, cannot be true. If he ported to go to the right of the other tug, above referred to, before seeing the Packer, that would explain some of his testimony, though it would introduce other contradictions.

7. Much of the contradiction in the testimony may be explained by the different times at which the observations of the witnesses may have been made. There is no question that after the Wolverton made her sheer towards the New York shore she had the Packer upon her own port bow. Several of the witnesses who testified, including the wheelsman of the Wolverton and of the Atlanta,
17 did not see the Packer until after this sheer was made. Their evidence on this point is, therefore, irrelevant. I do not mean to say that all of the evidence on the part of the libellants can be harmonized in this way; plainly it cannot be.

8. The cause of the collision, in my judgment, was the determination of Captain Schultz, of the Wolverton, to run into the eddy ahead of the Packer, and between her and the New York shore, instead of keeping his former course and passing outside of and astern of the Packer, as that course would have carried him, had the Packer been allowed to keep on under her starboard
18 wheel. The testimony of the libellants' witnesses, as to having the Packer two or three points on their port bow, is, I think, founded upon the picture in their minds of the situation after it became noticeable and dangerous, through the sheer given by the Wolverton in order to get into the eddy across the Packer's bows.

9. Assuming that the Wolverton had the Packer either directly ahead, or even a little on her own port bow, before she ported her wheel, I am of opinion that under the peculiar circumstances of navigation around the Battery, the pilot of the Wolverton had no right to attempt to go inside the

Packer as he did, or to change her course to starboard; and that the Packer being in the slack water when first seen and near the shore, far inside of the Wolverton, had a right to retain that position as respects the Wolverton, and properly kept to port under a starboard wheel, with a signal of two whistles; and that her subsequent conduct was without fault. The Wolverton, in crossing the river and attempting to run across the tide into the eddy between the Packer and the New York shore, would necessarily cause her tow, astern on a hawser to swing round outwards with the tide and present a longer front to boats coming in the opposite direction. Such a manœuvre would evidently be very hazardous to her tow, rendering it difficult, if not impossible, for the Packer to escape her. The Packer might, it is true, on first seeing the Wolverton, have gone right out from the eddy into the East river tide, and thus have got around the Atlanta; but the tide in that case would have swept her round and far astern of her course. The custom of navigation about the Battery has determined against any such unnecessary and unreasonable navigation as that, on the part of a tug which is already in the eddy, going eastward near the shore. The evidence shows clearly, in my judgment, that the prevailing custom in navigating around the Battery on the ebb-tide, where a tug and tow are going eastward in the slack water near the barge office and another tug, with a tow on a hawser is coming down the East river and bound up the North river, but much further out in the stream, requires the latter to keep off from the former, and not to attempt to run between the former and the shore, in order to get into the eddy, but to go outside and astern of the other tug. The libellant's witnesses do say that it is customary for tugs going either way to hug the shore; but none of them assert that, in the situation of the two tugs, as above described, and as I have found it, the Wolverton

22 could properly endeavor to run in near shore as she did; while several of them, and all of the respondent's witnesses, justify the Packer in her course in the situation described. This usage is founded upon the manifest considerations of prudence and convenience above stated. This usage must have been known to the pilot of the Wolverton. The statute did not entitle him to run towards the shore inside of the Packer as he did but forbade it; and the settled usage as well as the most obvious prudence also forbade it. The pilot of the Packer, being already very near the shore when the Wolverton was sighted, had a right to rely on the Wolverton observing this usage, under the peculiarities
23 of navigation around the Battery. Being near the shore it was his duty to keep there, and to navigate precisely as he did; giving as he did the appropriate signals of two whistles. The ordinary rules of navigation do not apply to such a case; it falls within Statute Rule 24, and the exceptions to the inspectors' rules (page 38), which for good reason permit going to the left, and require the other vessel to navigate accordingly. The circumstances here did furnish good reason for going to the left, and justified the Packer's course. The pilot of the Wolverton knew it or ought to have known it; and he was bound to accept without hesitation the first signal of two whistles given by the Packer in time,
24 and to pass to the left, which the result shows he could easily have done. In fact, the testimony of Schultz himself, and the ground upon which he justifies his conduct, serve to confirm the view above taken. He does not claim that he would be justified in running between the Packer and the shore if the Packer were already near the shore, in the eddy, and heading towards the piers; and that is the situation as I find it. His defense is upon the ground that the Packer was, in reality, further out in the stream than the Wolverton, and that the two were approaching port to port; and that is the

claim in the libel; a wholly different situation, which, as I find, the evidence in this case disproves. 25

10. Nor can I doubt that, had the Wolverton merely kept her own course without change the collision would have been avoided. The Atlanta was struck after she had ported her helm and passed some distance on that course. This alone, I think, shows that had the Wolverton and Atlanta kept their previous course, and allowed the Packer to keep on to port, they would have gone on clear to the left. The Packer, in giving two whistles and keeping to the left, had the right to assume that the Wolverton would at least keep her course and 26
not sheer to the right. But by the Wolverton's porting, the Packer was compelled to stop and the collision was thus brought about. Though the Packer was navigating where she had not by statute any right to be, still this, as I have said, in no way contributed to the collision. The positions of both tugs were perfectly well known to each other in ample season to avoid any collision. The Packer being near the shore, was navigated according to the prevailing usage and without any fault that I can perceive. Being near the shore, usage and common prudence required her to keep there, as respects the Wolverton, which was far out in the
stream; while the latter was bound by the same 27
usage and prudence to pass outside without reference to her particular heading in crossing and coming down the river. The collision was, in my judgment, solely the fault of the Wolverton, in persisting in an unauthorized and dangerous attempt, which the Packer could not have anticipated, to run into the eddy between the Packer and the shore. When this was seen to be pertinaciously adhered to on the Wolverton's part, the Packer gave way and endeavored to avoid the collision, but without avail. As I cannot find any fault on her part, the libel must be dismissed, with costs.

128 Sct 9

28 SUPREME COURT OF THE UNITED STATES.

No. 286.—October Term, 1890.

The Steamtug E. A. Packer, John Scully, Claimant, Appellant, *vs.* The New Jersey Lighterage Company.

Appeal from the Circuit Court of the United States for the Southern District of New York.

[May 11, 1891.]

29 This was a suit in admiralty instituted by the New Jersey Lighterage Company, appellee, owner of the barge Atlanta, against the steamtug Dr. John Wolverton, which had the Atlanta in tow, and also against the steamtug E. A. Packer, to recover damages for a collision between the Atlanta and a barge lashed alongside and in tow of the Packer, on her port side, known as Cross Creek Barge, No. 5, which occurred in the afternoon of October 25, 1880, near the mouth of the East river in the harbor of New York. Service never having been obtained upon the Wolverton, the case proceeded against the Packer, and in the District
30 Court a decree was granted, dismissing the libel upon the ground that the Wolverton was solely at fault for the collision (20 Fed. Rep., 327). Upon appeal to the Circuit Court, this decree was reversed, upon the ground that the collision was partly, at least, the fault of the Packer, and that, under the rulings of this Court, the libellant was entitled to recover its entire damages against her, which amounted, with interest, to $5,404.31, for which a decree was rendered against her.

Pursuant to the act of February 16, 1875 (18 Stat.,

315), the following facts were found by the Circuit Court:

"*First.*—That on the 25th day of October, 1880, the libellant was the owner of the barge Atlanta and was a common carrier of a cargo on said barge, as alleged in the libel.

"*Second.*—That on the day, in the afternoon, a collision occurred between said barge and the barge Cross Creek, No. 5, then in tow of the steamtug Packer.

"*Third.*—That the barge Atlanta and her cargo were on that day taken in tow by the steamtug Wolverton at Roberts' stores in the East River, to be towed to the Long Dock, Jersey City, and were towed astern of said tug by a hawser of one hundred and fifty feet in length between the tug and barge.

"*Fourth*—That on that day the tug Packer was bound from the North river into the East river, having in tow on her port side the barge Cross Creek, No. 5, loaded with about 450 tons of coal, the barge projecting beyond the bow of the tug.

"*Fifth.*—As the Wolverton, with her tow, was crossing the mouth of the East river the Packer with her tow, was heading around the Battery into the East River, passing the New York shore opposite the Barge Office, nearly two hundred yards away.

"*Sixth.*—That the tide in the East river was, ebb and at about full strength. The Wolverton and her tow were going with the tide about seven miles an hour and the Packer and her tow were proceeding against the tide at a speed of about two miles an hour.

"*Seventh.*—That the Packer and her tow had come so far around from the North river before seeing the Wolverton as to be in the ebb tide coming out of the East river, and when she saw her was heading up against that tide and was about

200 yards out from the shore opposite the Barge Office.

"*Eighth.*—The vessels saw each other when about 500 yards apart, and at that time the course of the Wolverton was about N. W. by N. and the course of the Packer was E. by N., and as they approached each other the Packer had the Wolverton on her starboard bow and the Wolverton had the Packer on her port bow, the Wolverton being further out in the river from the New York shore than the Packer, and the vessels being upon crossing courses converging toward the New York shore.

"*Ninth.*—As soon as the Packer saw the Wolverton she blew two blasts of her steam whistle. She was then under a starboard wheel and making in somewhat towards the end of the piers, but upon signaling the Wolverton she starboarded her wheel still more. The Wolverton made no reply to the Packer's signals, but kept on her course without abating speed until within about 200 feet. The Packer then blew two more whistles and reversed her engines, and the Wolverton ported her wheel. The Wolverton passed the bow of the Packer and her tow, but the libellant's barge was unable to do so, and her port side came into collision with the bow of the Packer's tow.

"*Tenth.*—At the time the Wolverton ported her wheel danger of collision was imminent and a collision seemed unavoidable.

"*Eleventh.*—There was nothing in the river to interfere with the navigation of either vessel. The collision occurred about 400 or 500 feet off the ends of the piers and just below the slip of the South Ferry.

"*Twelfth.*—There was no local usage of navigation applicable to the situation of the vessels when they discovered each other.

"*Thirteenth.*—That between the tide of the East river and the North river there is an eddy which

extends out about 400 feet from the Barge Office, and the Packer had passed through this eddy and reached the ebb tide, which struck on the port bow of her tow and swung the vessels still further off shore before her pilot saw the Wolverton. 37

"*Fourteenth.*—The libellant's barge was in all respects properly navigated. By reason of the collision the barge and cargo sustained serious injury."

The following conclusions of law are found:

"*First.*—The two tugs being on crossing courses, it was the duty of the Packer, having the Wolverton on her starboard hand, to keep out of the way, and the duty of the Wolverton to keep her course. 38

"*Second.*—It was the duty of the Packer to port her wheel and stop and reverse her engine in time to avoid the collision.

"*Third.*—The libellant is entitled to recover against the Packer the damages sustained by the collision."

The course of the Wolverton, as stated in the eighth finding, was subsequently changed by the Circuit Judge from N. W. by N. to W. N. W.

From the decree entered upon this finding an appeal was taken by the owner of the Packer to this Court.

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Mr. Justice BROWN delivered the opinion of the Court.

This Court has repeatedly held that under the act of February 16, 1875 (18 Stat., 315), "to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes," we are no longer at liberty to pass upon disputed questions of fact, but are bound to accept the findings of the Circuit Court as conclusive, and are limited to a determination of questions of law and to the validity of such rulings, excepted to at the time, as may be presented by a bill of exceptions

prepared as in actions at law. (*The Abbotsford*, 98 U. S., 440; *The Benefactor*, 102 U. S, 214; *The Clara*, 102 U. S., 200; *The Adriatic*, 103 U. S., 730; *The Connemara*, 108 U. S., 352, 360; *Watts* vs. *Camors*, 115 U. S., 353, 363; *The Gazelle and Cargo*, 128 U. S., 474.) In the case of *The Abbotsford* it was held that the only rulings which could be presented for review here by bill of exceptions were those made upon questions of law, following in this particular a multitude of prior rulings under analogous statutes. This was also affirmed in *The Annie Lindsley*, 104 U. S., 185; with an additional remark by Mr. Justice Woods, that "where the Circuit Court has *passed on all the issues* we cannot listen to complaints that it has refused to find certain facts which it was asked to find, or has found certain other facts which the weight of the testimony did not warrant."

It does not, however, necessarily follow that this Court is bound to determine the case upon the precise facts found by the Circuit Court, if, in its opinion, such findings are ambiguous, contradictory or incomplete, or fail to establish a satisfactory basis for a decision. The Circuit Court is bound to pass upon and find every material and ultimate fact necessary to a proper determination of the question of liability, and, in case of refusal to make such finding, an exception may be taken thereto, which can be considered by this Court upon appeal. It cannot be that this Court is concluded by a finding, for instance, of a single material fact tending to show fault on the part of one vessel, when there is uncontradicted evidence of other facts, which show either that this fault did not contribute to the collision, or that there were contributing faults upon the part of the other vessel which might make a case for a division of damages. If a Circuit Court could find *as a fact* that a collision was due to the fault of one vessel, an appeal to this Court would be useless, and unless the find-

ings set forth all the material facts, the ultimate finding of fault becomes more or less a finding of a fact, when it should be a legal inference from other facts. 43

The question is by no means a new one in this Court. In *The Francis Wright*, 105 U. S., 381, 387, it was said by Chief Justice Waite, that "if the Circuit Court neglect, or refuses, on request, to make a finding one way or the other on a question of fact, material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal taken in time and properly presented by a bill of exceptions may be considered here on appeal. So, too, if the Court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found when in truth there was none. Both these are questions of law, and proper subjects for review in an appellate Court." It was indicated that the bill of exceptions "must be prepared as in actions at law" where it is used, "not to draw the whole matter into examination again," but only separate and distinct points, and those of law. This practice was approved in *Merchants' Ins. Co.* vs. *Allen*, 121 U. S., 67. In *The John H. Pearson*, 121 U. S., 469, the question arose as to what was meant by the term "Northern Passage" from Gibraltar to New York, and it was held that the Court below should have ascertained from the evidence what passages there were which vessels were accustomed to take, and then determine which of them the vessel was allowed by its contract to choose as the northern, and the decree was reversed and the case remanded for further proceedings upon this ground. 44 45

46 There is no practice under this statute which is peculiar to Courts of admiralty. The rule is general, that wherever the trial Court finds the facts and the conclusions of law therefrom, it is bound to find every fact material to its conclusion, and a refusal to do so, if properly excepted to, is a ground for reversal. Thus, in cases tried by the Court without a jury, under Rev. Stats., sections 649 and 700, the findings of the Circuit Court are conclusive upon this Court, and the power of this Court to review extends only to the sufficiency of the facts found to support the judgment (*Tyng* vs. *Grinnell*, 92 U. S., 467); and if not sufficient, the case may be remanded for trial upon other issues involved
47 therein. *Ex parte French*, 91 U. S., 423. The findings of the Court under these sections are treated as a special verdict, and are gauged by the rules applicable to them (*Norris* vs. *Jackson*, 9 Wall., 125; *Copelin* vs. *Insurance Co.*, 9 Wall., 461, 467; *Supervisors* vs. *Kennicott*, 103 U. S., 554); and, as was said in *Graham* vs. *Bayne*, 18 How., 60, 63, "if a special verdict be ambiguous or imperfect—if it find but the evidence of facts, and not the facts themselves, or finds but part of the facts in issue, and is silent as to others, it is a mistrial, and the Court of Error must order a *venire de novo*. They can render no judgment on an im-
48 perfect verdict, or case stated."

Under a similar method of procedure in several of the States it is held that the findings must contain all the facts and circumstances necessary to a proper determination of the questions involved; and in default thereof, the judgment of the Court below will be reversed, and the case sent back for a new trial. *Wood* vs. *La Rue*, 9 Mich., 158; *Howerter* vs. *Kelly*, 23 Mich., 337; *Adams* vs. *Champion*, 31 Mich., 233; *Briggs* vs. *Brushaber*, 43 Mich., 330; *Bates* vs. *Wilbur*, 10 Wis., 415; *Addleman* vs. *Erwin*, 6 Ind., 494.

The facts found in the present case are substan-

tially, that the Wolverton and her tow were bound from Roberts' Stores, in the East river, upon the Brooklyn side, to the Long Dock, in Jersey City, upon a W. N. W. course, and at a speed of about seven miles an hour. The Packer, with her barge alongside, constituting in fact one vessel, was heading around the Battery into the East river, and at the time she first saw the Wolverton was upon a course E. by N., and heading against a strong tide, at a speed of about two miles an hour. The two vessels made each other about five hundred yards apart. From this statement of their respective headings it is quite evident, and the Court also finds as a fact that they were upon crossing courses; that the Packer had the Wolverton on her starboard side, and was bound, under the 19th Rule of § 4233, to keep out of her way. 49 50

In fulfilling this obligation, however, she was entitled to act, within the limitations imposed by the requirements of good seamanship, upon the judgment of her master, and to put her helm to port or starboard; and there was a correlative duty, no less imperative, on the part of the Wolverton "to keep her course." Rule 23. *The Sea Gull*, 23 Wall., 165, 176; *New York, &c. Steamship Co.* vs. *Rumball*, 21 How., 372, 384; *The Adriatic*, 107 U. S., 512, 518. While this duty of avoidance is ordinarily performed by porting and passing under the stern of the other vessel, and while this is evidently, under ordinary circumstances, the safer and more prudent course, cases not infrequently occur where good seamanship sanctions, if it does not require, that the maneuver shall be executed by starboarding and crossing the bows of the approaching vessel. Of course, in doing this the steamer takes the risk that the approaching vessel, while fulfilling her own obligation of keeping her course, may reach the point of intersection before she has passed it herself; and hence at night, or in thick weather, the maneuver 51

58 reference to a collision between the Packer and the Atlanta, since the latter was 150 feet astern of the Wolverton, and to bring about a collision between her and the Packer, or the Packer's tow (which being lashed alongside may be treated as identical with the Packer), it was necessary for the Wolverton to cross from the starboard to the port bow of the Packer, and to drag the Atlanta under the bow of the latter. Indeed, it seems impossible to exonerate the Wolverton in view of the other finding, that the vessels saw each other when about 500 yards apart, and that, as soon as the Packer saw the Wolverton, that is, at this distance of 500
59 yards, she blew two blasts of her steam whistle. Hearing this signal as she did, or as she was bound to do, the porting of the Wolverton must almost of necessity have brought about a collision. The whistle was a signal to her that porting was the one thing she must not do. If, in fact, as testified by her pilot, the Wolverton ported four or five points before the collision took place, it not only disposes of the 10th finding, but shows that the collision was largely, if not wholly, the fault of the Wolverton.

The Wolverton seems also to have been at fault for excessive speed. If the officer in charge were satisfied that the signals of the Packer and her ap-
60 parent starboarding were an error and involved a risk of collision, it was his duty, under rule 21, to slacken speed before crossing her bows, or, if necessary, to stop, or even to reverse, if it could be done without danger to tow. This rule was applied by the House of Lords to a collision between crossing vessels in the recent case of *The Memnon*, 62 Law Times (N. S.), 84; *S. C.*, 6 Asp. Mar. Law Cases, 488, wherein it was declared to be the duty of the vessel entitled to keep her course to comply with the rule as to slackening speed, or stopping and reversing, if necessary, and if she does not do so, the burden is upon her to show that to continue

her speed was in fact the best and most seamanlike maneuver under the circumstances. It is not easy to see how, under any view of the facts, the Wolverton can be exonerated from fault in this particular. 61

It appears from the bill of exceptions that, after the Circuit Court had made its findings of fact in this case, eight additional findings were submitted by the claimant, which the Circuit Judge declined to find otherwise than he had already found, except with regard to the compass course of the Wolverton, which he had found to be N. W. by N. by mistake. We have already held that the Circuit Court is bound to find all such facts as are material and necessary to a correct determination of the question of liability involved. Upon examination of these proposed findings in connection with the evidence set out in the bill of exceptions, we think that most of them are immaterial, or are covered by the findings actually made. The sixth, however, is important, and reads as follows: "The porting of the Wolverton's wheel when she was about 200 feet from the Packer was a change of four or five points from her course." We think the claimant was entitled to a finding in regard to this point. It would also have been more satisfactory if the Court had found the number of points the Packer swung under the order to starboard giving "upon signaling the Wolverton," as found in the ninth finding. But as no request was made for a finding upon this point, and no exception taken to the omission, it is now too late for the claimant to demand it. 62 63

The decree of the Court below will be reversed, and the case remanded for further proceedings in conformity with this opinion.

True copy.

Test: JAMES H. MCKENNEE,
[SEAL.] Clerk Supreme Court U. S.

64 WALLACE, Circuit Judge:

The decree formerly made in this case, adjudging the libellant entitled to recover against the Packer for the damages sustained by the collision between the libellant's barge Atlanta and the barge in tow of the Packer, having been reversed by the Supreme Court upon appeal, because this Court refused to make a finding of fact which that Court, upon the evidence before it, thought the appellant entitled to, the case is now here for a redetermination. Nothing was decided by the Supreme Court authoratively, except that, upon the evidence before it, the appellant, the owner of the Packer, was entitled to the finding of fact which he had re-
65 quested. The facts in the case substantially appear in the statement preceding the opinion of the Supreme Court. (*The E. A. Packer*, 140 U. S., 360; 11 Sup. Ct. Rep., 794.) Inasmuch as upon any further review there will be no bill of exceptions, and there is no necessity for any findings of fact by this Court, it would seem unnecessary to make the finding which was the subject of the exception upon which the former decree was reversed. Nevertheless, in view of the opinion of the Supreme Court, it has seemed to me the more proper course to reconsider the evidence, much of which was not embodied in the record on the appeal, with a view
66 of making or refusing to make the finding. In doing this the entire evidence in the case has necessarily been re-examined and reconsidered. I have reached the conclusion, reached before, that the libellant is entitled to a decree against the Packer. I have little to add to my former opinion filed when the cause was originally decided; but it may assist the Circuit Court of Appeals, in case of an appeal from the present decision to that tribunal, to refer to some of the evidence bearing upon the questions of fact and to some additional reasons for my conclusions of law.

The master of the Packer testified originally that

291

the collision took place from 150 to 200 yards off 67
the New York side of the river. This statement is in harmony with the facts set forth in the answer of the Packer. If she was 200 yards off while rounding the Battery, she could not have approached, under the helm she carried, and with the ebb-tide on the port bow of her tow, much nearer than this distance up to the time of the collision. Without referring to other testimony and corroborating circumstances, the place of collision would seem to be correctly located where it was placed in the original findings. It will be observed that, according to the theory of the Packer's answer, there was not any rank change of course made by the 68
Wolverton after the Packer discovered her. Its theory is that the Packer was entitled, because of the situation of the vessels when they first saw each other, to go between the Wolverton and the New York shore. It avers that when she first saw the Wolverton it would have been impossible to clear the Atlanta by going off on a port wheel, and that any movement to the right would have rendered a collision with the Wolverton inevitable. It assumes that the Atlanta was in fault for the collision because she did not follow the Wolverton directly, and it distinctly charges fault in this respect upon the Atlanta; while, in enumerating the faults of the Wolverton, it does not charge any fault upon 69
her because of any change of course on her part. The testimony of Barker, and of Ackerley, each of whom was at the wheel of the Atlanta, indicates that there was no change of course on the part of the Wolverton until collision seemed imminent. These, among other considerations, have led me to the conclusion that there was no change of course on the part of the Wolverton, until, as her master testifies, he ported to avoid destruction when the tugs were within 200 feet of each other. The vessels were not sailing by compass. I have accepted the testimony of Frazer, who was in the pilothouse of

70 the Wolverton, and who seems to be an intelligent and trustworthy witness, as the most reliable by which to ascertain the course of the Wolverton. He says that after she got out from Roberts' stores she headed for about Pier 5, on the New York side, and was making allowance for the ebb tide to carry her opposite Pier 1 or 2, when she should reach the New York shore, intending to get in there as close as she could. The testimony of this witness also shows, as does that of the pilot in charge of the Packer, that the Atlanta sagged a little with the tide below the course of the Wolverton, but that she did not sag so much
71 that the Wolverton could not, while going at the speed she maintained, manage her in a way consistent with her safety or that of other vessels.

The testimony of the various witnesses is practically in accord, making due allowance for the discrepancies which always occur upon such a question, that the tugs were about 500 yards apart when they discovered each the other. I have accepted as substantially correct the statement of Adams, the engineer of the Wolverton, who locates the Wolverton at a distance of 300 or 400 yards off the New York shore when the Packer was 400 or 500 yards away, and who locates the Packer at that time a little on the port bow of the Wolverton.
72 The weight of testimony is, decidedly, that the Packer had the Wolverton on her starboard bow when she first discovered her; and, indeed, this is fairly inferable from the statements in the answer of the Packer. There is no evidence in the record, worthy of consideration, to denote that the Atlanta was improperly steered, or did not follow the Wolverton as closely as she could, in view of the action of the tide.

Upon the facts, as I have found them, it being entirely plain that the Atlanta was innocent of any fault, the libellant is entitled to compensation for the loss sustained by the collision, either from the

293

Packer or from the Wolverton, or from both. If this were a suit between the two tugs, and cases could be decided upon sentimental considerations, the sympathies of the Court would be wholly with the Packer. But the Wolverton is not in Court, and the only question to be determined is whether the Packer was guilty of fault which was contributory to the collision. If she was, the libellant is entitled to a decree. It is obvious that the collision might have been easily avoided if the Wolverton had yielded her strict rights, and altered her course to port when informed by the signals of the Packer that the latter proposed to pass across her bows by keeping to port. The Packer was in a very inconvenient situation and naturally preferred keeping between the New York shore and the Wolverton, because by altering her course to starboard she would expose herself and her cumbersome tow broadside to the full force of the tide. The Wolverton, however, wanted to get the benefit of the slack water near the shore at the Battery, and refused to accede to the proposition of the Packer, although she could have done so with perfect safety and without serious inconvenience to herself. But I cannot find upon the facts that the Packer could not have avoided the Atlanta as well as the Wolverton if she had taken a course to the starboard and astern of the vessels; and I agree with the learned District Judge who decided this cause in the District Court that she could have done so.

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Inasmuch as when the vessels first saw each other, at a distance of about 500 yards away, the Packer had the Wolverton on her starboard hand, and the Wolverton had the Packer on her port bow, it was the duty of the Packer to avoid the Wolverton, and the correlative duty of Wolverton to keep her course. In that situation Rule 2 of the Supervising Inspectors, then, as now, in force, required the Packer to fulfill her duty of avoiding the Wolverton by passing to the right of the latter,

76 and required the Wolverton to pass to the right of the Packer. It is unnecessary to decide whether this regulation is one which has the force of a statutory rule, or whether it is one in excess of the authority which is conferred by law upon the Supervising Inspectors. It suffices that the rule, at least as to the duty of the Packer under the circumstances of the present case, formulates the practice which is approved by the best nautical experience, and which has been adopted as an imperative regulation by the international marine conference. The language of the Supreme Court, when this cause was before it, proves that the Packer was in fault in taking a course to port:

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"If it were clear that no collision would have occurred had the Wolverton kept her course, then the starboarding of the Packer was not a fault, since the point of intersection would be ahead of or astern of the Packer. But if such starboarding was likely to involve risk of collision, then, of course, it was a fault."

That the starboarding of the Packer did in this case involve risk of collision is demonstrated beyond peradventure or cavil by the fact that, before the Wolverton changed her course at all, the Packer saw that danger of collision was imminent, and that she could not pass ahead of the Wolver-
78 ton, and reversed her engines.

I cannot see how the twenty-fourth rule of navigation has any application to the case. That rule authorizes a departure from the other rules when there are special circumstances rendering a departure necessary "in order to avoid immediate danger." There were no such circumstances when the vessels were 500 yards apart, and when the first fault of the Packer, if there was any, was committed. This was conceded in the opinion of the District Judge. There was no immediate danger, and no condition in the situation which would have rendered it un

safe for her to have taken her course to starboard. 79
It would have been inconvenient for the Packer to do so, but nothing more. If it was the duty of the Wolverton to alter her course to port when she heard, or ought to have heard, the first signal of the Packer, then it is clear the collision is attributable solely to her fault. That proposition has not been advanced by counsel for the Packer, and, notwithstanding some expressions in the opinion of the Supreme Court which may be interpreted as sanctioning it, I cannot believe that it was intended to be so declared. Unless one vessel has a right, merely at her option, and without regard to any special circumstances, to dictate to another vessel 80
a departure from a rule which it is the right and the duty of the latter to observe, this proposition cannot be maintained.

It remains to be considered whether the collision is attributable to the conduct of the Wolverton, either because she did not reverse before the collision, or because she ported her helm. Upon this question that which seems to me the pregnant and controlling circumstance in the situation is not adverted to in the opinion of the Supreme Court. That circumstance is that while the Wolverton was fulfilling her duty of keeping her course, and relying upon the Packer to fulfill her duty of keeping out of the way in the manner she had selected, by passing in front of the Wolverton, the Packer slowed 81
and reversed her engines, and brought herself practically to a stand still in the water. This was done when the tugs were within a distance of about 200 feet of one another. If the Packer had not thus brought herself to a stand still when she was nearly in the path of the Wolverton, it is probable that the Wolverton would have passed astern; at least, it is possible that the Wolverton might have done so. Unless it can be found that the Wolverton could not have passed astern of the Packer had not the latter reversed, it cannot be adjudged that

82 the collision is solely attributable to the conduct of the Wolverton in not reversing. The evidence does not warrant such a finding.

Was the Wolverton in fault for porting? It seems to have been assumed by the Supreme Court that she was, and that tribunal reversed the former decree of this Court because of the refusal of this Court to find, as the evidence before the Supreme Court denoted, that the course of the Wolverton was changed to starboard four or five points from her former course. In the opinion it is said "that the porting of the Wolverton must almost of necessity have brought about a collision." How this result
83 could happen when the Packer was off the port bow of the Wolverton, and at a stand-still in the water, or nearly so, having abandoned her attempt to go forward in front of the Wolverton, I am at a loss to understand. It was for this reason, and because I deemed the finding immaterial, that I refused to find as requested. It seems to me that the more the Wolverton could have changed her course to the starboard the greater would have been the chance of safety to both vessels, because the greater the change of course the wider would have been the distance between them. If the Packer had maintained her speed, I am not satisfied that a change of course of four or five points to starboard on the
84 part of the Wolverton would have enhanced the chances of a collision; but as it was, if it would have been safe for the Wolverton to proceed without altering her course, it certainly could not have been unsafe to alter it in a direction which would carry her a further distance away from the bows of the Packer than she would have otherwise gone. I have very great doubt whether it was possible for the Packer, in the short intervening distance between the intersecting courses of the two tugs, to change her course four or five points to starboard. Any such change is utterly inconsistent with the theory of the Packer's answer. Still, Shults, the

master of the Wolverton, states that he effected such a change by porting, and, notwithstanding much in the testimony that leads me to a contrary opinion, I will find for present purposes that such a change was made. If it should be assumed that if the Wolverton had reversed, or had not ported, the collision might have been avoided, the question remains whether the Packer was not in fault for bringing the Wolverton into a situation where her master was liable to commit an error of judgment. 85

I understand the rule to be well established that in every case where a vessel, by her own negligence, or the breach of a statutory rule, places another in great peril, the latter will not be held guilty of negligence because at the last moment she did something that contributed to the collision, or omitted to do something that might have avoided it. It has often been held by the Supreme Court that a vessel which by her own fault causes a sudden peril to another cannot impute to the other as a fault a measure taken *in extremis*, although it was a wrong step, but for it the collision would not have occurred; and that a mistake made in the agony of the collision is regarded as an error for which the vessel causing the peril is altogether responsible. *The Nichols*, 7 Wall, 656; *The Carroll*, 8 Wall., 302; *The City of Paris*, 9 Wall., 634; *The Lucille*, 15 Wall., 676; *The Favorita*, 18 Wall., 598; *The Falcon*, 19 Wall., 75; *The Sea Gull*, 23 Wall., 165. If this is the correct rule, it would seem that if the Wolverton was in fault for not reversing, or for porting, or for not starboarding, it was a fault committed in the throes of a collision, which not only does not exonerate the Packer, but does not subject the Wolverton to liability. Whatever the conclusion may be as to fault on the part of the Wolverton, it suffices to establish the liability of the Packer to the libellant; that the Packer was guilty of fault which was con- 86 87

88 tributory to the collision. She insisted upon adopting the most hazardous mode of fulfilling her duty of avoiding the Wolverton, and attempted to do it in a way which her own conduct conclusively shows was not practicable, except at risk of collision. A decree is ordered for the libellant.

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U. S. CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

THE NEW JERSEY LIGHTERAGE CO.,
Libellant and Appellee,

vs.

The Steamtug "E. A. PACKER,"
JOHN SCULLY,
Claimant and Appellant.

Before
Lacombe, C. J.
Shipman, C. J.

Appeal from Circuit Court for the Southern District of New York.

LACOMBE, Circuit Judge:

The libel in this case was filed to recover damages for the loss of the barge Atlanta, which was sunk in a collision with a barge in tow of the E. A. Packer, upon her port side, at about four o'clock in the afternoon of October 25th, 1880, off Piers 1 or 2 in the East river. The Atlanta was in tow of the tug Wolverton on a hawser of about twenty fathoms, and was bound from Roberts' Stores, Brooklyn, up the North river. The Packer had come down the North river and rounded the Battery, being bound up the East river to Sixty-first street. After sighting each other, the Packer starboarded and the Wolverton ported, with the result above indicated.

The Wolverton after the collision betook herself out of the jurisdiction. A libel filed against her in the Eastern District of Pennsylvania by the master of the Packer's tow was dismissed (13 Fed. Rep.,

4 44), but, being out of this jurisdiction, she was not made a party to the suit at bar.

The peculiar history of this suit makes it unnecessary to rehearse the facts in detail; to do so would be but needless repetition, as they will be found stated at great length in the various opinions hereinafter referred to.

The District Court held the Wolverton in fault for "persisting in an unauthorized and dangerous attempt to run into the eddy between the Packer and the shore." It exonerated the Packer principally because, in its judgment, the evidence showed a "prevailing custom in navigating around the Battery on the ebb tide," which gave it the right to
5 rely on the Wolverton's "observing that usage," and permitted the Packer, notwithstanding Rule II of the Supervising Inspectors (quoted *post*) to go to the left, giving the appropriate signal of two whistles and to require the Wolverton to navigate accordingly (20 Fed. Rep., 327). An appeal was taken to the Circuit Court, which reversed the decree of the District Court, holding that upon the proof "no practice is shown prevailing with that uniformity which is requisite to a usage applicable to the situation between the vessels here, or which justified the Packer in insisting upon the right of keeping inside." That Court held the Packer in
6 fault because, when the vessels "saw each other, the Packer had the Wolverton on her starboard bow and the Wolverton had the Packer on her port bow. The vessels were then on courses crossing each other and converging towards the New York shore, and it was the duty of the Packer, under the XIX rule of navigation, to keep out of the way," which she should have done "by [porting] her wheel and [stopping] and [reversing] her engine in time to avoid the collision." The opinion of the Circuit Court, filed July, 1886, is not reported, but its findings are incorporated in the opinion of the Supreme Court, 140 U. S., 360.

The claimant thereupon appealed to the Supreme Court. After an elaborate discussion of the practice and procedure upon appeals under the Act of February 16, 1875 (18 Stat., 315), that Court held that the appellant was "entitled to a finding" of the Circuit Court, touching a proposition, which he had submitted to that Court, as follows: "Sixth: The porting of the Wolverton's wheel when she was about 200 feet from the Packer was a change of four or five points from her course." The Supreme Court therefore reversed the decree and remanded the case to the Circuit Court "with directions to proceed therein in conformity with the opinion of [the Supreme] Court. 7

The Circuit Court thereupon found the fact as to the Wolverton's change of course in accordance with the request, but refused to find that the Wolverton was solely in fault and again decreed in favor of the libellant against the Packer. From that decree this appeal in taken. 8

Meanwhile the practice in admiralty was materially changed by the passage of the Act of March 3d, 1891, establishing U. S. Circuit Courts of Appeals; and the case now presented for review by this Court differs from that considered by the Supreme Court, not only by reason of the additional finding, but because the provisions of the Act of 1875 not applying to Appeals to the U. S. Circuit Court of Appeals (the Havilah, 1 U. S. App. 1), all the evidence in the case is brought up for consideration. Compatively little of it was before the Supreme Court. 9

The opinion of the Supreme Court contains the following:

"From this statement of their respective headings it is quite evident, and the Court [meaning the Circuit Court] also finds as a fact that they were upon crossing courses; that the Packer had the Wolverton on her starboard side, and was

10 bound, under the 19th Rule of Section 4233, to keep out of her way.

"In fulfilling this obligation, however, she was entitled to act, within the limitations imposed by the requirements of good seamanship, upon the judgment of her master, and to put her helm to port or starboard; and there was a correlative duty, no less imperative, on the part of the Wolverton to keep her course.' Rule 23 (citing cases). While this duty of avoidance is ordinarily performed by porting and passing under the stern of the other vessel, and while this is evidently under ordinary circumstances, the safer and more prudent course, cases not infrequently occur where
11 good seamanship sanctions, if it does not require, that the manœuvre shall be executed by starboarding and crossing the bows of the approaching vessel. Of course, in doing this the steamer takes the risk that the approaching vessel, while fulfilling her own obligations of keeping her course, may reach the point of intersection before she has passed it herself; and hence at night, or in thick weather, the maneuver would be likely to be attended with great danger. In the present case, however, there were circumstances which indicate that the selection of this course may have been such an exercise of discretion upon the part of the
12 master as was not inconsistent with sound judgment and good seamanship. It was broad daylight, the weather was clear, and a careful lookout could not fail to hear the signals of an approaching vessel, and to estimate properly her course, her bearings and her distance. There was a strong tide ebbing out of the East river and the Packer was making her way slowly and with some apparent difficulty against it. It was obviously to her advantage to keep as near to the piers, heading as she was, directly against the tide, as it was possible to do, since such a decided porting as would be necessary to avoid the Wolverton and her tow

would have compelled her to take the full force of the tide upon her port side, and exposed her to a strong outward drift, as well as to the probability of the Atlanta sagging down upon her. Whether the starboarding of the Packer was a fault or not would depend largely upon the question whether, assuming that the Wolverton kept her course and maintained her then rate of speed, either vessel would pass the point of intersection before the other reached it. If it were clear that no collision would have occurred had the Wolververton kept her course, then the starboarding of the Packer was not a fault, since the point of intersection would be either ahead or astern of the Packer. But if such starboarding was likely to involve risk of a collision, then, of course, it was a fault. 13 14

"It was suggested upon the argument that there was a rule of the supervising inspectors, making it obligatory upon a crossing steamer to avoid the one having the right of way by porting her helm in all cases. But no such rule is incorporated in the record or the briefs, and it is not a regulation of which we can take judicial notice. But even if such rule were proved, it is by no means clear that the circumstances of this case would not bring it within the exception contained in the 24th Rule of 'Special Circumstances' requiring a departure from the general regulations." 15

The appellant contends that this declaration of opinion is such a dispositien of the merits of the controversy that the additional finding of fact being made as he prayed, the only thing left for the Circuit Court to do, was to dismiss the libel. Had the old practice remained undisturbed and were the case again presented to the Supreme Court, with nothing added to the old record but the new finding, it is probable that Court would make such a disposition of the suit. But the situation is wholly different. All the testimony in the

case came before the Circuit Court on the second hearing and by the appeal is brought before this Court, and the existence of the very rule of the Supervising Inspectors, which the Supreme Court refused to consider, because it was not proved, is now a fact in evidence. Under these circumstances it was clearly the duty of the Circuit Court to pass upon the whole case, and in disposing of this appeal we are not constrained by the expressed opinion of the Supreme Court upon the incomplete case, which that tribunal had before it. And, indeed, the Supreme Court itself most carefully avoids passing finally upon the rights of the parties.

The rule of the supervising inspectors, which has been referred to, is as follows: "Rule II. When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation), they shall pass to the right of each other, as if meeting 'head to head,' or nearly so, and the signals by whistle shall be given and answered as in that case specified." And in directions accompanying the diagram referred to, it is provided that: "A. [The vessel having the other B. on her starboard hand, and being herself on the port hand of B.], should put his helm to port and pass astern of B., while B. should continue on his course or port his helm, if necessary to avoid collision, each having previously given one blast of the steam whistle, as required by the rules when passing to the right."

That when they sighted each other, the Packer had the Wolverton on her starboard hand, seems not to be seriously disputed. After a careful consideration of the testimony, we are satisfied that she was herself on the port bow of the Wolverton. Such is the concurrent testimony of all libellant's witnesses, and the Packer's pilot at first so stated, although he afterwards insisted that the Wolverton was head on, and later that he was on her starboard

side. The vessels were, therefore, in the situation where the Inspector's Rule required a vessel situated as the Packer was, to "put his helm to port and pass astern" of the other, "having previously given one blast of the steam whistle." The Packer did not do so, nor did she even hold her course, which her counsel contends was sufficient to ensure safety, provided the Wolverton made no change. She was under a starboard wheel when she saw the Wolverton, at once blew two whistles, and, although no answer was received, immediately starboarded still more. So far as *her* liability is concerned, the only question is—was this violation of the rule excusable, or, if not excusable, is it plain that it did not contribute to the catastrophe. That the Wolverton was also in fault would not warrant a reversal in this case. The Atlanta was free from fault, and is entitled to a judgment against either vessel, which it libels and shows to be guilty of a fault contributing to the collision. 19 20

The opinion of the Supreme Court discussed the question solely from the point of view of a vessel obliged to fulfil the requirements of the 19th rule of Sec. 4233 (the starboard-hand rule), which directed her to keep out of the way, but yet left her the choice of thus keeping out of the way either by porting or starboarding, although ordinarily that duty of avoidance is performed by porting and passing under the stern of the other vessel. The utmost that is held by the Supreme Court in this case is that upon the facts before it, there might be found sufficient excuse for the Packer's undertaking to perform that duty by crossing the bows of the approaching vessel. But one most important fact was not before that Court. By reason of the circumstance that the record contained no proof of the Rules of the Supervising Inspectors, it was constrained to ignore the fact that besides the considerations of light and weather, courses, bearings, speed and distances there was 21

22 another element of the situation, essential to a correct decision, to be taken into account by the master of the Packer, namely, that he was navigating in waters, where a local rule directed his choice of maneuvers, and advised the approaching vessel what that choice would be. If an effort by starboarding, to cross the bows of an approaching vessel would have been "attended with great danger" if attempted at night or in thick weather, it would seem to be equally dangerous when attempted in the light of a controlling rule of navigation which clearly advised such approaching vessel that such effort was precisely the one thing which would not be attempted, and directed that vessel not only to
23 keep her course, but even to assist a diametrically opposite maneuver by herself porting. That the Supervising Inspectors have made rules applying to navigation in the waters where these vessels were is now proved; that one of those rules covers the situation in which they found themselves at sighting is plain; their authority to make such rules was not disputed on the argument, nor on the point involved here, is there any apparent inconsistency between them and the rules of Sec. 4233. The rules prescribed by authority, so far as they apply, constitute the law by which Courts must test the navigation of vessels when brought in question before them. One of the witnesses, an experienced
24 tugboat pilot, ingenuously remarked that "the law is against our rules of navigation around here"; that "there is no law in this world ever can be made, in my opinion, to regulate the towing or sailing around the harbor of New York"; and that "the law, as I understand it, is made by men that don't understand it." All this may or may not be so, but a rule regulating the movement of a boat situated as the Packer was has been made, and violation of such rule is a fault unless the vessel violating it can show some excuse, such as the 24th Rule of Section 4233 contemplates, for her disobedience.

309

The Supreme Court held that it was "by no 25
means clear that the circumstances of this case would not bring it within the exception contained in the 24th Rule of 'Special Circumstances,' requiring a departure from the general regulations." But the whole case was not before that Court, and we concur with both the District and the Circuit Court in the conclusion that the Packer might, on first seeing the Wolverton, have gone right out from the eddy into the East river tide, and thus have got around the Atlanta in the way prescribed by the Inspectors' Rules, that there was no "immediate danger" in such a manœuvre, and no condition in the situation which would have rendered it unsafe for her to take her course to starboard. It would 26
undoubtedly have been inconvenient for the Packer to do so; the tide would have swept her round and far astern of her course; she would have had to make up her lost ground with a heavy tow against an ebb tide, but mere inconveniences will not excuse her departure from the rules; such departure must be "necessary to avoid immediate danger," Rule 24. It may have been proper for the Packer to suggest to the Wolverton, as she did by her two-whistle signal, that they should agree to courses which would enable them to pass each other, otherwise than as Rule II. required, thereby making her own navigation easier and not seriously in- 27
conveniencing the Wolverton, a manœuvre which if co-operated in by the Wolverton would seemingly have been free from any risk of collision; but she had no right to depart from the rule, in the absence of an expressed assent on the part of the Wolverton, simply for her own convenience.

The District Judge exonerated the Packer on the ground that a "prevailing custom in navigating around the Battery on an ebb tide" gave her the right to insist on keeping near the piers, notwithstanding the Inspectors' Rule. There may be such a custom, but in the record before us there is not

28 sufficient evidence to prove it. Three witnesses testify to its existence, but twice that number—of equal experience in harbor navigation—swear that, though vessels do frequently pass each other in that way, there is no rule or general custom as to which side of each other they shall go. The mere fact that vessels often agree with each other to depart from the rule when rounding the Battery is not sufficient to excuse the vessel, which, without securing assent to such an agreement, takes upon herself the responsibility of departing from it, merely for her own convenience. We are unable to find that the failure of the Packer to obey the rule did not contribute to the conclusion, and there-
29 fore concur with the Circuit Court..

As to the navigation of the Wolverton, it is unnecessary for us to express an opinion, as she is not before the Court.

Decree of Circuit Court affirmed with interest and costs.

(Endorsed)—U. S. Circuit Court of Appeals, Second Circuit.—The New Jersey Lighterage Co. *vs.* The E. A. Packer. Opinion.—United States Circuit Court of Appeals, Second Circuit, filed October 17, 1893, John A. Shields, Clerk.

30

311

U. S. CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

THE NEW JERSEY LIGHTERAGE COMPANY,
Libellant and Appellee,

vs.

The Steam Tug "E. A. PACKER," &c.,

JOHN SCULEY,
Claimant and Appellant.

To the Honorable Justices of the United States Circuit Court of Appeals for the Second Circuit:

The petition of John Scully respectfully shows:

First.—That heretofore, to wit, on the 9th day of May, 1893, there came on to be heard before this Court, the petitioner's appeal from a decree entered against him by the Circuit Court of the United States for the Southern District of New York, on the 18th day of February, 1892.

Second.—That on the 17th day of October, 1893, this Court made and rendered its decision affirming, in all things, the decision of the said Circuit Court.

Your petitioner files this petition and asks for relief in the following terms:

First.—That there may be a reargument of his appeal, or,

Second.—That certain questions, hereinafter to be enumerated, may be certified by this Court to the Supreme Court of the United States, in order that the last named Court may certify instructions to this Court, or may reserve to itself the whole case for its subsequent decision.

Third.—That there may be a stay of proceedings ordered by this Court pending the determination of this Court of the foregoing questions.

No mandate or judgment in any form has yet been signed by this Court.

Fourth.—As ground for reargument, and as the sole ground now put forward, although many others exist, your petitioner alleges that this Court, in its consideration of the appeal aforesaid, entirely overlooked the reasons advanced by your petitioner why the aforesaid decree or judgment was wrong and ought to be reversed.

At any rate, not one of those reasons is referred to in the opinion filed herein by this Court.

Thus, amongst other things, nearly the whole of the oral argument, and as much as three-fourths of the printed one, were directed to show that the tug, "E. A. Packer," committed no contributive fault when she starboarded her wheel, because this manœuvre in no wise brought about the subsequent collision.

Your petitioner represents that no answer has ever been made to this contention, because it rests upon the testimony of the libellants themselves.

The opinion of this Court treats the matter as if it were a wholly inexcusable fault for the "E. A. Packer" to have starboarded her wheel, leaving no room at all for the consideration that this act was a perfectly harmless one.

313

There are other reasons for this petition that a re-argument be granted, but if the one just hereinbefore set forth is not deemed sufficient for the purpose, then the enumeration of others would be useless.

If the petition to re-argue shall be denied, then your petitioner asks that the following questions shall be certified to the Supreme Court for its instructions:

First.—Whether or not the Supreme Court intended by its reversal of the judgment obtained herein in the Circuit Court, on the 4th day of December, 1886, to order a new trial in the Circuit Court; or whether, on such reversal, only the question was to be considered whether or not the steamtug Wolverton had ported her helm a very short time before the collision to the extent of four or five points.

Second.—Did the Supreme Court intend that all the findings of fact theretofore made by the Circuit Court were rendered null by its decision reversing the judgment, so that either or both parties to the litigation might offer new proofs on any relevant issue; or did said Court intend that the findings already made should stand as valid, subject only to such modification as the additional finding aforesaid, if affirmed or negatived, might produce.

Third.—Was it not the intention, and in effect the determination, of the Supreme Court that the libel herein should be dismissed, provided the Circuit Court found, on sufficient evidence, that the Wolverton did port her wheel four or five points when she was about 200 feet away from the Packer.

Fourth.—Did the Supreme Court intend that a decree should be again entered against the appellant, the owner of the Packer, with additional costs and damages in case and after

the Circuit Court had made the aforesaid finding in his favor, for the non-finding of which the claimant's appeal to the Supreme Court had been sustained.

Fifth.—Assuming that the Packer and the Wolverton were approaching starboard to port, and that the Packer, after signalling at a distance from the Wolverton of 500 yards or more, starboarded her wheel and went to port, was this fact in and of itself a condemnatory fault?

Sixth.—Did not the Supreme Court intend that the starboarding aforesaid was not a condemnatory fault, if it appeared that the Wolverton subsequently, that is to say, when about 200 feet away from the Packer, ported her own wheel four or five points and kept on with unabated speed?

Your petitioner requests that if his motion be denied, a stay of proceedings be granted pending his application to be made to the United States Supreme Court for a writ of certiorari, which he stipulates to make without delay.

John Lowell

315 Jersey

~~Southern~~ District of ~~New York~~, ss.:

JOHN SCULLY, being duly sworn, says, that he is the petitioner herein; that he has read the foregoing petition and the same is true.

John Scully

Sworn to before me this 6 day of November, 1893.

Tobias Gale
Notary Public

(Seal)

I am proctor of the petitioner herein. I have read his petition and know its contents. I certify that it is made in good faith and in the belief that his prayer for relief should be granted.

Edwin
Pet

376

376

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

THE NEW JERSEY LIGHTERAGE COMPANY,
Libellant and Appellee,

vs.

THE STEAMTUG "E. A. PACKER," her engines, &c., JOHN SCULLY,
Claimant and Appellant.

Motion for re-argument denied; certificate refused; mandate will be held till November 24th.

November 14, 1893.

317

UNITED STATES OF AMERICA,
Southern District of New York. } ss.:

I, JOHN A. SHIELDS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify, that the foregoing pages, numbered 1 to 316 inclusive, contain a true and completed transcript of the record and proceedings had in said Court, in the case of The New Jersey Lighterage Company, libellant and appellee, against the steamtug "E. A. Packer," her engines, &c., John Scully, claimant and appellant, as the same remain of record and on file in said office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 16th day of November in the year of our Lord one thousand eight hundred and ninety-three, and of the independence of the United States the one hundred and eighteenth.

[SEAL.]

JOHN A. SHIELDS
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1893.

In the Matter

of

The Petition of JOHN SCULLY, Claimant of the Steamtug E. A. Packer, for a Writ of *certiorari*, &c., to the United States Circuit Court of Appeals for the Second Circuit, or for the allowance of an Appeal.

Only a concise statement of facts is now necessary, seeing that the case has been thoroughly explored by this Court, Vol. 140, U. S. R., 360.

Nevertheless, the prolonged conflict over this subject justifies a brief preface, to the following argument:

The cause at issue is one of collision between the steamers E. A. Packer and Wolverton, on the 25th day of October, 1880, in New York Harbor, off the Battery Point, in clear daylight.

These vessels were approaching each other on almost opposite courses. The course of the Packer was several hundred feet inshore, of the Wolverton.

The Packer was going very slowly, because

she was burdened by a heavy tow on her port side. When these steamers were five hundred or seven hundred yards apart, the Packer chose to go still nearer the shore, and gave the appropriate signal. After she had gone in some three hundred (300) feet, and when she was only about two hundred (200) feet from the end of Pier One, New York City (such is the unimpeached testimony of both pilots), the Wolverton, suddenly, without warning, and with unabated speed, took a sheer in shore of nearly five (5) points, and thereby brought her tow under the Packer's bow.

It is important to repeat that the place of collision, on the undisputed testimony of both pilots, who were also wheelsmen, was only two hundred (200) feet from the end of the New York Pier (fols. 251, 395).

The pilot of the Wolverton admitted that his course, had it not been changed, would have carried him some three hundred (300) feet away from the Packer, and under her stern (fols. 234–284).

This testimony was given by the libellants, and was not disputed.

The cause was tried before, and decided by, the United States District Court on the 13th day of May, 1884.

That Court dismissed the libel, declaring that the Wolverton was solely to blame, because she had taken this rank sheer across the Packer's bows.

Then the libellants appealed to the Circuit Court, where a new trial was had on substantially the same testimony as before; whereupon the Circuit Court reversed the previous decree, and sustained the libel.

That Court gave, in the course of procedure, four-

teen (14) findings of fact, which embraced every issue on which testimony had been given.

These findings of fact were as inimical to the Packer as they possibly could have been made on the testimony, but the Packer accepted them, as she was bound to do, and has not challenged them since. There was some testimony to support them.

One of these findings of fact was, that the vessels were approaching starboard to port, and that the Packer was bound to keep out of the way. Another finding of fact was, that the Wolverton was only two hundred (200) feet from the Packer when she took an inshore sheer.

The sole ground upon which the Packer appealed to this Court was this: The Circuit Court had refused to find that this sheer covered four (4) or five (5) points.

The opinion of this Court leaves nothing further to be added on this subject.

The judgment of the Circuit Court was reversed by this Court on the 11th day of May, 1891.

At this time the Circuit Court of Appeals Act, and the joint resolution, amendatory thereof, were in force.

On this reversal of judgment, the Supreme Court sent down its mandate to the old Circuit Court, with directions to proceed in accordance with the opinion which accompanied it. A new trial had not been ordered, and it is believed that a new trial could not have been ordered.

When, however, the case was again taken up by the old Circuit Court on the 14th day of December, 1891, that Court declared that the record had been remanded in order that a new trial should be had, and then disposed of the cause, precisely as

it had done, years before, on the appeal from the District Court.

It did, indeed, find affirmatively that the Wolverton's sheer covered four (4) or five (5) points; but, in effect, it held this all-important fact to be of no consequence, seeing that on a new trial, as this proceeding was held to be, findings of fact were no longer to be regarded.

(*Vide* the opinion of the presiding Judge, page 290 of the record, herewith submitted).

It should be added that no additional testimony, whatsoever, was heard on this proceeding. The Packer's position was precisely the same, as it had been, when she appealed to this Court.

Inspector's Rule No. II. was read, and so, likewise, all the testimony previously taken in the District Court.

It seems, to judge from the second opinion of the old Circuit Court, that a new fault had been discovered in the Packer's conduct, to wit, "*that of reversing and trying to go backwards before the Wolverton's rank sheer had been discovered.*"

(It will be remembered that the Wolverton had taken this sheer when only 200 feet from the Packer, and while going at the rate of eight (8) miles an hour.)

After this second decree against the Packer, which was given on the 18th day of February, 1892, for heightened damages and costs, a serious question arose, to wit, whether her second appeal should be taken to the Supreme Court, or to the Circuit Court of Appeals. It seemed to her advisers that the express words, as well as the plain intention, of the joint resolution amendatory of the act of March 3d, 1891, required the appeal to be taken to this Court.

Accordingly on the 21st day of March, 1892, the justice of this Court, representing the Second Circuit, was requested to allow an appeal. He refused to do so, on the ground that this application must be made to the Circuit Court of Appeals. Thereupon, the Packer appealed from the decree of the old Circuit Court to the Circuit Court of Appeals, where argument was had on the 9th day of May, 1893.

The Court of Appeals treated the proceedings not only as a new trial in the old Circuit Court, but as still another new trial on appeal.

On the 17th day of October, 1893, the Packer was condemned by the Circuit Court of Appeals.

No other reason was given for condemning her, than the fact of her having starboarded her wheel.

This act was held to be a fault, *de jure*, and no consideration was given to her argument, based on the libellants' testimony, that this starboarding of her wheel in no wise led to the collision.

The fact that the Wolverton had taken a sheer of four (4) or five (5) points just before the collision, which this Court deemed to be so important as to call for a reversal of judgment, was not alluded to by the Circuit Court of Appeals.

(See the Opinion of the Circuit Court of Appeals, page 299.)

The Packer now applies for a writ of *certiorari*, or for permission to appeal on submitting again the papers that were submitted to the justice of this Court in March, 1892.

In behalf of the E. A. Packer I submit the following propositions, viz.:

(1.) The Supreme Court had jurisdiction to issue the mandate, aforesaid, on the 29th day of May, 1891.

(2.) Jurisdiction to issue a mandate, necessarily implies jurisdiction over proceedings taken under it.

The power to see that the mandate is properly executed lies, exclusively, in the Court which has issued it.

(3.) If the inferior tribunal to which the mandate has been sent declines to obey it, or acts under an erroneous construction of it, or does more or less than the mandate required it to do, the only means of redress, to the party suffering, is by a new appeal to the Court which issued the mandate, or by an application to it for a mandamus.

(4.) The old Circuit Court disobeyed the spirit of the mandate of this Court, and the opinion that accompanied it, by proceeding to hold a new trial, and thereby disregarding the findings of fact that had already been made, and the new finding of fact for the sake of which its previous judgment had been reversed.

(5.) For the same reason the Circuit Court of Appeals did not acquire jurisdiction over the cause.

In all causes of admiralty and maritime jurisprudence, the Circuit Court of Appeals sits as a Court of original, as well as appellate, jurisdiction, and necessarily entertains every appeal as a new trial.

(6.) A writ of *certiorari* will bring up the ques-

tion as to the jurisdiction of the Circuit Court of Appeals, as well as the question whether or not the old Circuit Court obeyed the mandate of this Court.

First.—It will not be denied, that the Supreme Court had power to hear and determine the case of the Packer on her first appeal, notwithstanding the enactment of March 3d, 1891.

On this undeniable proposition, it is submitted that the jurisdiction of the Supreme Court remained unimpaired over this case, so long as it existed, and at whatsoever stage in its history, the intervention of an appellate Court could become necessary.

Prior to the Act of March 3d, 1891, the Supreme Court had the capacity to entertain an appeal herein from the Circuit Court, "and to affirm, reverse or modify," a decree of the lower tribunal.

This power to adjudge and remand having been conferred by law, would have been lost by force of the subsequent enactment, because this case was not one of those enumerated in Section 5 of the Act, had not a joint resolution been adopted, which provided that the jurisdiction of the Supreme Court should not be impaired, "in any case now pending before it."

The case of the E. A. Packer was then, to-wit: on March 3d, 1891, pending in the Supreme Court, and, therefore, was not affected by the general provisions of the act.

It is conceded, of course, that such a case as this

belongs to none of the classes enumerated in Section 5, of the new statute.

But the joint resolution amendatory of the act, created a new class, which was just as explicitly defined, as those already enumerated in the aforesaid section.

A doubt could not exist on this matter, if the joint resolution had concisely said, "This act shall not apply to any case now pending in the Supreme Court."

The intention of such words would have been too plain to be disputed.

But the words, "jurisdiction of the Supreme Court shall not be impaired as to any case now pending, &c.," are simply equivalent to the other formula.

It is just the same as if the hundred or more cases, then on the docket of the Supreme Court, had been named.

These are words of definition merely, and, seeing that they include a group of cases well known and accurately described, they amount to the same thing as if they had enumerated individuals.

The only question that could arise is the meaning of the words, "impairment of jurisdiction."

In this behalf, it is submitted that the enactment of 1891, was in and of itself, an impairment of the jurisdiction of the Supreme Court.

Thus, the Supreme Court once had jurisdiction over every cause of admiralty jurisprudence in which $2,000 was in controversy.

Afterwards its jurisdiction, as to this subject, was limited to a controversy involving more than $5,000, and to this extent—that is, as to all possible causes involving amounts between $2,000 and $5,000—its jurisdiction was impaired.

Afterwards, by the new act, its jurisdiction was further impaired, to the extent of excluding all causes of admiralty jurisprudence.

Every limitation of power is an impairment thereof.

Hence, all admiralty causes on the Supreme Court docket prior to March 3d, 1891, would have fallen but for the passage of the joint resolution aforesaid. which declared that, as to such causes, the new act should not work an impairment of jurisdiction of the Supreme Court.

144 U. S. R., 570.

If this is not a sound construction of this qualifying clause, it is difficult to determine what it means. The words are quite as explicit, as though they had expressly named this case. And if the words "non-impairment of jurisdiction" over the case of the E. A. Packer, "as pending, &c.," does not apply to that case, so long as it exists, it is difficult to put any limit on their meaning, for the power to hear and determine carries with it the power to decide. and this implies the further power to see that the decision made is carried into effect, and this again implies a power to entertain a new appeal. There is no warrant, whatever, in the new statute for the position that, while the Supreme Court was given power to retain causes on its docket, it can only hear and decide them; that its power is exhausted as to such cases after it shall have remitted its mandate, and that it is for the new tribunal to determine how this mandate shall be executed. On the contrary, the qualifying resolution leaves these causes precisely where they were before the new enactment—such is its literal meaning; and the implication is a very remote and unsatisfactory

one, to wit, that causes should be thus dismembered, to be heard now in one Court, and now in another; to be heard by one Court as to all proceedings before the mandate, and by another Court, as to all proceedings after the mandate.

I concede, of course, what an opponent might urge, that the jurisdiction of the Supreme Court is that of an appellate tribunal, only, over such a case as this; that when it shall have decided and remitted its mandate, its jurisdiction is at an end; that the case can be brought before it again, when necessary, only by appeal.

But this consideration makes for the present, or actual, jurisdiction of the Court, only, and would be equally applicable to every case which it might entertain.

Thus, it would apply to every case within any of the classes enumerated in section 5 of the act.

But this consideration has no weight now, because the dispute is over *a capacity to entertain jurisdiction, in general.*

The claimant's position is this, that the capacity of jurisdiction, by the Supreme Court, over the classes of cases enumerated in section 5 of the act, as well as over another, definite, and clearly defined, class; viz., those pending at a certain time mentioned, remained intact.

If the words of the joint resolution had run as follows:

"Jurisdiction shall not be impaired over cases now pending, *so long as pending*," it might be that the case could not be brought up by a new appeal.

But seeing that the resolution says, plainly, that jurisdiction shall not be impaired as to certain cases which it there proceeds to define clearly, no

forced construction should be allowed to deprive the words of their meaning, which is this, "*as to such and such cases, herein enumerated, this enactment has no effect.*"

This argument derives corroboration from the following data:

Second.—If this Court had power to remand the cause (which certainly is not disputed), then it had the power to supervise its mandate, and to see that it was properly executed, and this was an *exclusive* power

This proposition is elementary, and seems to be almost self-evident.

Mandates are of little importance, if they are not obeyed.

But what Court can compel obedience to orders, unless it be the one that made them?

Mandates, or the opinions accompanying them, are not always so clear as to exclude doubt of their meaning.

But what Court shall construe, and deliver the true meaning of, an opinion, if not the one whence it issued?

Now, if the Act of March 3d, 1891, intended to confer on the Circuit Court of Appeals the power to supervise the execution of the mandates of this Court, and to declare the meaning of its opinions in a large number of causes, it certainly has not said so.

The words quoted, heretofore, do not seem to imply such a thing. They declare, plainly, that jurisdiction over these causes remains in this Court, and jurisdiction means free and complete jurisdiction; not for a limited time only, but so long as the case is a subject in litigation.

Such is the reasonable and natural meaning of the words, and it is in accordance with precedent and sound practice.

It certainly is anomalous, that one Court should have the exclusive power to construe the mandates of another one.

Suppose, in the present case, the Circuit Court had refused to execute this mandate, on the ground that it had become a formality, merely, by force of the new enactment; that the reversal of judgment herein was, necessarily, an order for a new trial, seeing that this Court had lost jurisdiction over its own mandate, and no other Court had acquired it.

On this hypothesis, could you not have issued a mandamus to compel obedience of your mandate?

But would you have jurisdiction to issue a mandamus, and not jurisdiction to entertain an appeal in the same cause? (It will be shown, further on, that the Circuit Court of Appeals has no power to supervise the mandates of this Court.)

The action of the Circuit Court, on reversal, realized the foregoing hypothesis.

It did, indeed, find that the Wolverton had taken a sheer of five (5) points, but it gave the Packer no benefit of this finding, for it then proceeded to decree against her a second time.

The successful appeal was not worth what it cost; the Packer was left worse off than before.

This action was taken by the Circuit Court on an erroneous construction of the Act of 1891.

The Circuit Court undoubtedly believed that your jurisdiction over the case of the Packer was completely lost, when once you had decided it, and, therefore, that the subsequent proceedings could have been nothing else than a new trial, seeing that your mandate no longer had any sanction.

So, too, when the Circuit Court of Appeals took up the case.

It did not proceed to determine that your mandate had been obeyed, or not obeyed.

It treated the matter precisely as if there had been no mandate.

It held that the proceedings were a new trial, as every admiralty cause on appeal must be, and proceeded to decide against the Packer on a record different to that which had been before you; not on a record of facts which arose after the mandate, but on testimony, let it be worth much or little, that had been given years before in the District Court.

I concede, however, that this procedure was strictly correct if the foregoing construction of the new Act is wrong.

I do not lose sight of the fact that you have the right to review by *certiorari*, but this writ rests in discretion, and is a mere accident.

The Packer's contention is, that she has the absolute right of appeal to this Court.

In Texas *vs.* Anderson, 149th, U. S. R. 240, this question was presented by a Circuit Court of Appeals:

"Does the Act give to the Circuit Court of Appeals jurisdiction, by appeal, a writ of error or otherwise to review the decrees, orders or judgments made by Circuit Courts construing a mandate from the Supreme Court of the United States and in executing the same?"

The answer was, No.

(I confess that the language of the opinion, in that case, is guarded, and somewhat doubtful. It is the only decision, apparently, relative to the question, subsequent to the Act of 1891. But previously reported cases do not leave the subject in doubt).

Thus, in Sibbold *vs.* United States, 12 Peters, 492, the Court says:

"Whatever was before the Court and is disposed of, is considered as finally settled. The inferior Court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, nor give any other or further relief, nor review it upon any matter decided upon appeal for error apparent, nor intermeddle with it further than to settle so much as has been remanded. After a mandate no rehearing will be granted. On a subsequent appeal nothing is brought up but the proceedings subsequent to the mandate. In case of disobedience, a mandamus or other appropriate writ will go."

This authority has never been questioned. It has been followed by many decisions, which repeat its dicta more or less closely.

As before urged, the principle involved is fundamental and elementary.

The case of Dubuque, 1 Wall., 69, is quoted because it is rather closer to the question.

"When this Court reverses a judgment with a mandate to the Court below to enter judgment for the defendant, the Court below has no authority but to execute the mandate, and it is final in that Court. Hence, such Court cannot, after entering the judgment, hear affidavits, or testimony, and grant a rule for a new trial; and if it does grant such a rule, a mandamus will issue from this Court ordering it to vacate its rule."

In Cook *vs.* Burnley, 11 Wall., 674, the Court says:

"Final process is never issued by this Court in

the exercise of its appellate jurisdiction, except in cases where a State has once refused to execute the mandate of the Court. Instead of that the mandate is transmitted to the subordinate Court, and where the directions contained in the mandate are precise and unambiguous, it is the duty of the subordinate Court to carry it into execution, and not to look elsewhere to change its meaning.

Where the subordinate Court commits any substantial error in executing the mandate of the Supreme Court, it is well settled law that a second writ of error or appeal, as the case may be, will lie to correct the error, &c."

Following these decisions, the Court says, in 97th U. S. R., 362, "the effort of the appellant, was to open the case below, and to obtain leave to file new pleadings, introducing new defences. This he could not do. The rights of the parties, and the subject matter of the suit, were finally determined upon the original appeal, and all that remained for the Circuit Court to do, was to enter a decree in accordance with our instructions, and carry it into effect.

If in the progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for re-examination, only proceedings subsequent to the mandate."

In Perkins *vs.* Fourniquet, 14th How., 328, and in Georgetown R. R. Co. 140th U. S., 95, it is held that proceedings, subsequent to the mandate, can be reviewed in this Court, either under an appeal, or by writ of mandamus.

Many more decisions might be cited.

But it now seems clear on authority of prece-

dents, as well as in the course of general practice, that this Court did not, in the sense of general jurisdiction, lose sight of a case that it had decided; but that it possessed the power to recall the case, subsequent to its mandate, and to review proceedings taken thereunder. This power could be exercised in many ways; by writ of error, appeal, or mandamus, or even by a common order on motion.

The contention of the Packer, is, that this power was not taken away by the act of 1891.

Finally; the Packer lost nothing by taking an appeal from the Circuit Court, to the Circuit Court of Appeals.

She had previously asked to be allowed to appeal to this Court, and her motion had been denied by competent authority.

Considerable doubt was, and is, entertained on the meaning of the enactment of 1891.

In view of the facts that her motion had been denied, that much doubt as to right procedure existed, and that urgency of action was necessary, she was advised to appeal to the Circuit Court of Appeals, in the expectation that this Court would finally review proceedings, either by allowing an appeal, or by issuing a writ of *certiorari*.

Third.—If the Court will not allow an appeal, deeming that appellate jurisdiction, as it existed prior to March 3d, 1892, no longer exists, then the Packer requests that you exercise the discretionary power, conferred upon the Court by the aforesaid act, to issue a *certiorari* in her behalf.

The only ground upon which this application is based is this; to wit, that your mandate was not obeyed by the inferior Court.

There is no other ground on which this application could be made, and there could not be a stronger one.

Here is the question in dispute: Did you intend, when you reversed the decree herein, to order a new trial?

A new trial, in admiralty jurisprudence, contemplates new pleadings and new evidence.

A new trial means, usually, a new litigation.

One thing is certain, neither in the mandate, nor in the opinion which accompanied it, was a new trial ordered, expressly. Indeed, to judge from the opinions of the Circuit Court, and of the Circuit Court of Appeals, a new trial was had, not because the mandate ordered it, but because such was the necessary effect of the provisions of the new enactment.

Perhaps it is enough to say, in this connection, that the new act had taken effect weeks before your decision was rendered.

Nevertheless, you sent down your mandate, which directed further proceedings in accordance with your opinion, and not otherwise. This would hardly have been done, had you contemplated the course which the lower Courts felt called upon to take, under the new law.

It would have been futile to say "do thus and so" to another tribunal, which had the power to proceed in an independent way.

Not only did the Court not order a new trial in this case, but I am not aware, (I now speak with the greatest reserve), that it has ever granted a new trial in admiralty procedure.

At any rate, since the adoption of the act of 1875, it would have been quite anomalous to do so.

As is well known, this act required "findings of

fact" to be made in every cause of admiralty jurisprudence, that should be taken, by appeal, to this Court.

Every such finding of fact was declared to be matter of special verdict, (that is to say, every finding of fact was, in itself, a verdict), and was not reviewable, if sustained by any evidence at all. Moreover, these findings of fact covered the whole dispute, unless some other finding of fact, of a material and ultimate character, should have been proposed and disallowed.

> The Frances Wright, 105 U. S. R., 381.
> Merchants Co. *vs.* Allen, 121 U. S. R., 71-2.

The conclusion seems forcible, therefore, that facts thus established should remain; that is to say, could not afterwards be upset, even by reversal of judgment, unless declared in the mandate, or opinion accompanying it, to be errors of law. On the other hand, a new trial would, in itself, annul all such findings of fact. The present case is an illustration of this argument.

It contained thirteen findings of fact, to which no objection was, or could have been made, seeing that every one of them was a special verdict supported by some evidence, either of fact or of inference.

The Packer did not ask to have the judgment reversed, because any one of these findings was erroneous. It would have been useless to do so. But she proposed a new finding; to wit., that the Wolverton had sheered five (5) points when 200 feet from her, and gone under her bows.

She asked to have the judgment reversed because this proposed finding was of an ultimate character;

because, that is to say, when read in connection with the other findings of fact, it would show that the Wolverton was wholly to blame, and that the libel ought to be dismissed.

On no other terms would the judgment have been reversed in order to let in this finding.

The Frances Wright, *ubi sup.*

It would not have been enough to show that this finding was material and important; it had to be strong enough to decide the conflict. Hence the reversal of judgment, and the remand to the Court below, opened for review the single question, whether or not the Wolverton had taken such a sheer.

Testimony would have been admissible on this question, but not on any other. Such was the course pursued in the case of the John H. Pearson, 121 U. S. R., 469; also reported as to proceedings subsequent to the mandate in 33d Fed. Rep., 845.

This view is also maintained by the Supreme Court, itself, in the City of New York, 147th U. S. R., 77, where, in speaking of the case of the E. A. Packer, the following language is used, to wit:

"The Circuit Court refused to find a specific fact which this Court thought to be material, and to have been proven by uncontradicted testimony, and the case was remanded for a further finding in regard to this point."

And the Supreme Court was justified in taking this view of the case.

The facts already found, together with this additional proposed finding, show that the Wolverton was wholly to blame.

This Court said, in its opinion, that the Wolverton was "largely, if not wholly, to blame."

Under the decision in the Great Republic, 23d Wall., 28-35 (and many other cases might be cited), the residuum of fault in the Packer for having starboarded her wheel, was not proximate to the collision.

This view, also, the Court seems to have taken in its opinion, for it declared, quite clearly, that the Packer was not in fault to starboard her wheel. Consider that these vessels were 500 yards apart, at least, when she "proceeded to starboard her wheel still more," and gave the proper signal; that she was then nearer shore than the Wolverton; that the vessels, at the time this signal was given, were on opposite and nearly parallel courses; that the Wolverton made no reply to this signal, but kept on with unabated speed until within 200 feet from the Packer, when she took a rank sheer of five (5) points, and went across the Packer's course.

These, substantially, are the facts found by the Circuit Court, and considered by the Supreme Court. They show clearly that the Wolverton was wholly to blame for the collision.

She had ample sea room on her port side; she was running with the tide; it certainly would have been as easy for her to sheer to port, as to starboard.

(Indeed, it wasn't necessary for her to sheer at all.)

In such circumstances as these, the Packer being in plain sight and burdened with a heavy tow, it was wilful misconduct for the Wolverton to have taken this rank sheer, and such misconduct as absorbs the whole fault.

See, again, the case of the Great Republic.

When the case was first before the Circuit Court, the Wolverton was excused for having taken this rank sheer, because she was in imminency of peril.

But the Supreme Court disposed of this defence by saying that the Packer's proposed finding, if allowed, completely refuted it.

Hence the findings, as they should have been modified under your mandate, would have shown the most culpable and wilful misconduct on the part of the Wolverton, because of her having taken an unlawful course at a momemt when it was certain to produce immediate collision, and all this without the slightest excuse.

An inspection of the diagram of collision, in connection with the findings of facts only, shows, moreover, that if the Wolverton had kept her course there would have been no collision. Therefore, the Packer contends that it was the purpose of your mandate, illustrated by your opinion, to order a rehearing only as to this proposed finding, and that the libel should be dismissed if the proposed finding was true.

How could it have been otherwise?

Did you intend by reversing the judgment against the Packer, because a proposed finding of fact had not been made, to leave her in a worse condition; after the finding had been made, than before? Would a judgment have been reversed for the sake of a fact disclosed to be of ultimate importance, if such fact was not to be allowed to change the result?

As before declared, the Circuit Court, on your mandate, took no new testimony. No new fact against the Packer was brought forward. But the Court annexed, so to speak, to the record sent down

by you the residuum of testimony previously taken in the District Court.

In effect, it was held that the case was again on trial, and was to be taken as if it had just come up from the District Court.

A new fault was then discovered against the Packer, which had not appeared in the previous findings of fact. She was held to be in fault because she had stopped, and reversed, while the Wolverton was crossing her bows. (The libellants alleged no such fault; the testimony did not show it. If the Packer had not reversed, she would have been cut in two).

Moreover, in thus holding a new trial, and treating the case as if it had came up a second time from the District Court, the Circuit Court was acting as a Court of appellate jurisdiction.

In no other capacity could it possibly have held a new trial.

But Section 4 of the new enactment expressly holds "that no appellate jurisdiction shall hereafter be exercised by said existing Circuit Courts."

This consideration materially strengthens the argument advanced in the previous articles of this brief.

Because, if the Supreme Court sent down this case to the old Circuit Court for a new trial, intending to relegate it, thereby, to the position it had been in when it left the District Court, then the Circuit Court could only have acted in the way of appellate jurisdiction.

(How else could the Circuit Court have entertained a cause of admiralty jurisprudence?)

Whereas, if the Circuit Court had no power, except to obey your mandate, and could exercise no discretion except within the limits thereby pre-

scribed; to this extent its jurisdiction had been preserved, by virtue of the words in the joint resolution already quoted.

It was necessarily implied, in the fact that this Court had power to issue a mandate in the case, that the inferior tribunal had power to execute it.

At any rate (and this is enough for the present purpose), the Circuit Court had no longer power to exercise appellate jurisdiction; and to hold a new trial was an exercise of appellate jurisdiction.

When the case came before the Circuit Court of Appeals, that tribunal proceeded to grant still another new trial. In this regard, its jurisdiction over maritime causes is the same as that of the old Circuit Court had been.

Thus, every appeal in admiralty is a new trial.

The anomalous proceeding is here presented of two Circuit Courts, each sitting as an appellate Court over the same case, and each holding a new trial therein.

Because, no one will deny that, if the new Circuit Court had jurisdiction at all over the old Circuit Court, it took the case from the latter on precisely the same terms as the old Circuit Court had taken it from the District Court, and had the right to hear new testimony and pass upon new issues.

It does not seem to have been the intention of the enactment of 1891 to confer such an authority upon the Circuit Court of Appeals. It was not intended to give the new Court authority, by way of appeal, over the old Court in a case where the latter had, itself, been a Court of Appeals reviewing the District Court.

However, the Circuit Court of Appeals, in taking this broad jurisdiction, proceeded to consider the

matter at large, and as if it had not been before the Supreme Court at all.

The new Court expressly says that it is not the same case as had been before the Supreme Court, and condemns the Packer because she starboarded her wheel.

The Circuit Court of Appeals treats this fact as absolutely conclusive.

(The facts that the starboarding in no way contributed to the collision; that it was done when the vessels were 500 yards apart, upon due signal; that the Packer, on her starboard wheel, would have cleared the Wolverton by several hundred feet, if the latter had not ported, received no attention at all.)

But the Supreme Court distinctly said (fol. 51 of the new matter) that it was not a fault in the Packer to put her helm to starboard, and (fol. 54) that the rule of the supervising inspectors was by no means inflexible. Then the Court proceeds to add that the Wolverton was guilty of gross fault in having continued at unabated speed; in having taken a rank sheer of four (4) or five (5) points just before the collision took place, which fact, alone, showed that she was "largely, if not wholly" to blame, and then proceeds to cite the case of the Memnon, to show that the burden of proof was on the Wolverton. This is the point of the case of the Great Republic, for there, as here, the opposing vessel was guilty of the grossest misconduct.

Then, at folios 61-63 of the new matter, the Court gives its reason in brief for reversing the judgment, because the Packer's proposed ultimate finding had not been made.

The Court proceeds to add that another finding of fact, therein specified, might well have been

made, but that "it is too late now for the claimant to demand it."

The findings of fact already made, taken in connection with the new finding, show that the sole proximate cause of this collision was the rank sheer of the Wolverton just before the collision.

One point more remains to be discussed.

Was any evidence, taken in the District Court, of the slightest importance, which was not embraced in the aforesaid findings of fact? Was any other fault than the starboarding of her wheel, shown against the Packer? (It will not be forgotten that no new testimony was taken in the remanded case.)

In folio 77 (second opinion of the Circuit Court) it is said, "Before the Wolverton changed her course at all, the Packer saw that danger of collision was imminent, and that she could not pass ahead of the Wolverton, and reversed her engines."

Again (fol. 80) "A pregnant and controlling circumstance is not adverted to in the opinion of the Supreme Court. That circumstance is that while the Wolverton was fulfilling her duty of keeping her course, and relying upon the Packer to fulfill her duty of keeping out of the way in the manner she had selected, by passing in front of the Wolverton, the Packer slowed and reversed her engines and brought herself practically to a standstill in the water. This was done when the tugs were at a distance of about 200 feet of one another. If the Packer had not thus brought herself to a standstill when she was nearly in the path of the Wolverton, it is probable that the Wolverton would have passed astern, &c."

(I.) Here is a new fault alleged, one that was not mentioned in the findings of fact.

It is a fault, moreover, inconsistent with the fault first found; to wit, the starboarding of the Packer's wheel. The Packer always contended that the starboarding of her wheel did no harm, yet she was condemned for it. Now, the same Court finds that her fault consisted in reversing.

(II.) There is not one word of proof in this case that the Packer reversed before the Wolverton changed her course. She reversed, *because* the Wolverton changed her course; otherwise she would have been cut in two.

(III.) No such fault is alleged by the libellants, nor was any evidence given to support it.

(IV.) The second conclusion of law, adopted on the former trial in the Circuit Court, read as follows:

"It was the duty of the Packer to port and stop and reverse her engines in time to avoid the collision (fol. 38, new matter).

(The Circuit Court of Appeals does not allude to this alleged transgression.)

In folio 73, the same Court declares, as between the two steamers "the sympathies of the Court would be wholly with the Packer."

Why so, if the Packer reversed, and stopped full, in the pathway of the other vessel?

But the 9th finding of fact, read with the new finding of fact, shows that the Packer could not have reversed and stopped, before the Wolverton changed her course.

In folio 66, the Court says the "place of collision was from 150 to 200 yards off the New York side of the river."

The respective pilots of the vessels ought to have known where the collision occurred. Both say, one speaking for the libellants, that it was only 200 feet from the end of the pier (fol. 251, fol. 395).

In folio 71, the Court adopts the belief that the Packer was further from the pier-ends, than the Wolverton. But this opinion is contradictory of the 8th finding of fact.

The Circuit Court "accepted the testimony of Frazer, who was in the pilot-house of the Wolverton, as the most reliable by which to ascertain the course of the Wolverton." This witness was a casual visitor of the Wolverton on this occasion. He was under no responsibility of employment.

At the time of the collision he says he was sitting in the pilot house reading a paper (fols. 118, 140). He elsewhere testifies that he knew very little about the circumstances of the collision.

But the pilot, and wheelsman, of the Wolverton, ought to know what her course was, and at what distance from the end of the piers.

He says that he saw the Packer 700 yards away, and when he, himself, was in the middle of the river (fols. 224, 251).

He admits that the Packer was, at this time, within the limit of the eddy-tide (fol. 691). So said the other pilot (fol. 389).

The witnesses who testified, thereto, said that the eddy of the strong tide extended out from the shore no more than 400 feet (fols. 602, 676, 679).

The pilot of the Wolverton also said that had he not changed his course, he would have gone 500 feet from the end of pier 2, to the southward, and still further from the end of pier 1, that is to say several hundred feet away from the place of collision.

No other witness than this pilot testified to the

course and distance of the Wolverton (fols. 220-284).

(This testimony is the most important in the case; it was offered by the libellants, and it leaves no doubt, that the starboarding of the Packer's wheel contributed nothing to the collision. If the Wolverton had not ported her wheel, she would have gone under the Packer's stern, at an assuredly safe distance away. But argument is no longer permissible on this point.)

The Circuit Court lays much stress on the fact "that the Packer's answer finds no fault with the Wolverton for having taken a rank sheer" (fols. 67, 68).

The fourth allegation of fault in the Packer's answer reads as follows:

"It was gross carelessness in the tug Wolverton to attempt to pass the Packer on her port side, it being evident that, if she did so, her tow would swing against the Packer, or her barge, and there being, moreover, every facility for the Wolverton to keep to the right, that is to say, further in the stream."

The appeal-book would have to be transcribed, if the testimony were quoted in support of this allegation.

In conclusion, what does the Circuit Court mean in holding, at folio 86 and elsewhere, that the Wolverton's mistake was made in the "agony of collision"?

Had not the Supreme Court found that the Wolverton was not *in extremis* when she thus ported?

Does not the diagram of collision, and the finding that the vessels were approaching starboard to port, show that when the Wolverton took a sheer to port of five points, she threw herself under the bows of the other steamer?

This is undeniably clear.

But further discussion of facts is not permissible.

So much has been said, merely to show that the Circuit Court, in the second proceeding, took up the case from an entirely new point of view.

As before stated, the Circuit Court of Appeals condemned the Packer, simply because she starboarded her wheel.

The other charge of fault, made by the Circuit Court, is not alluded to.

It was too plain, to be disputed, that the Packer did not reverse till after the Wolverton had changed her course.

The Packer now asks for an allowance of her appeal, or for a writ of *certiorari*.

Respectfully submitted,

EDWARD D. MCCARTHY,
Proctor and Advocate for Petitioner.

NOTE.—Diagrams of the collision, which have been already submitted to this Court, are still on its files.

They would be of great assistance to one dealing with the facts.

They were drawn in strict conformity with the findings of fact.

Again; petitioners' book, herewith submitted, contains the whole record of testimony taken from the District Court to the Circuit Court.

The portions characterized by marginal lines, comprise the record of evidence submitted here on the former appeal.

Office Supreme Court U. S.
FILED.
DEC 4 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1893.

In the matter of the Petition of JOHN SCULLY, Claimant of the Steamtug "E. A. Packer," for a writ of Certiorari, &c., to the United States Circuit Court of Appeals for the Second Circuit, or for the Allowance of an Appeal.

BRIEF

IN OPPOSITION TO PETITION.

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1893

Supreme Court

OF THE UNITED STATES.

In the Matter

of

the Petition of JOHN SCULLY, for a writ of *certiorari*.

Brief in opposition to Petition.

In opposition to the above petition the following brief is presented on behalf of the libellants in the case of The New Jersey Lighterage Co. *vs.* The tug *E. A. Packer*, sought to be certified.

First.

This Court has announced the rule, that a writ of *certiorari* would only be issued by it "in cases of peculiar gravity and general importance or in order to secure uniformity of decision."

Amer. Const. Co. *vs.* Jack. Railway, 148 U. S., p. 383.

The present case presents no such feature. The case of the *E. A. Packer* is not one of "peculiar gravity." It is an ordinary collision case, involving

about $7,500 only. It is not of "general importance." No one is interested in it or in any question involved in it, except the parties to the cause.

And there is no question of securing uniformity of decision.

The real reason for the presentation of this petition is the persistence of counsel. But that is not recognized by this Court as a valid reason for issuing the writ.

Second.

The petition contains several erroneous or immaterial statements.

1. It is stated (p. 2) that the finding referred to was "deemed *by the claimant* to be material and of an ultimate character."

What the claimant deemed it to be is of little importance.

The libellant did not deem it such. The Circuit Court did not deem it such. And the most that can be said as to this Court is that its opinion showed that it thought that that finding *might be* material or ultimate.

So it is also stated, on the same page of the petition, that the only question presented to this Court was whether that finding was "of a material and ultimate character."

This statement is not correct, and an examination of the opinion of this Court will show that it is not such. Other questions were presented to this Court and considered by it.

And the decision on this finding was only that this finding *might be* or might not be material, etc., depending upon other circumstances.

2. The petition says that this Court "*did not order a new trial.*"

This is an error. The Court in its opinion (p. 366) referred to the practice of sending a case "back for

a new trial" and directed this case to be remanded "for further proceedings in accordance with this opinion" (140 U. S., 370).

This was the identical order that was made in the case of The J. H. Pearson (121 U. S., 469, 474). And the further proceedings in this case were identical with the proceedings in that case. (33 F. R., 845).

In both cases there was a new consideration of the case by the Circuit Court, and a new decree.

3. It is stated (p. 3.) that "Rule II. of the Board of Supervising Inspectors *had been discussed at length* in the opinion" of this Court.

This is a surprising misstatement. This Court held that that rule, not being in the record, was "not a regulation of which we can take judicial notice;" and, so holding, of course it did not discuss that rule at all.

It should be stated that the Rule in question was not printed in the bill of exceptions which was before this Court on the appeal, by reason of omission. It had been agreed between the parties "that any of the Inspectors' Rules that are applicable to this case shall be considered in evidence." But that agreement was inadvertently omitted from the bill of exceptions.

The effect of the rule in question was therefore properly considered by the Circuit Court on both trials, although not considered by this Court.

4. The petition says (p. 3.) that "no allusion was made in the opinion of the Court of Appeals to the all important fact that the opposing vessel had ported her wheel some five points."

This is not correct. The opinion of the Court of Appeals set forth that this fact was found. (Record p. 301, fols. 7, 8.)

5. The petition says (p. 3.) that the Court of Appeals "does not allude to the equally important fact that the *Packer* had contributed in nowise to the collision."

This is not correct. The Court of Appeals said in

its opinion that it was *unable* to find that the failure of the *Packer* to obey the rule "*did not contribute to the collision.*" (Record, p. 310, fol. 28.)

And it denied the motion for a re argument which particularly called the proposition to its attention. (Petition fol. 15.)

Third.

I do not in this brief propose to discuss the brief of the counsel for the petitioner. Large portions of it are devoted to discussions of the whole case, and it is filled with erroneous statements of fact which I cannot take time to correct. I will, however, point out one in order to show this Court that the statements of the brief are not to be relied upon.

The brief (p. 26), says: "There is not *one word of proof in this case* that the *Packer* reversed before the *Woolverton* changed her course."

But the finding was that the *Woolverton* ported "when she was about 200 feet from the" *Packer* (Record, fol. 759), and Slover, the pilot of the *Packer*, gave this testimony:

"I blew him two whistles first. He was then about *500 yards away* from me (Record, fol. 318).

"I stopped after I blowed the first two whistles, I stopped my boat. It did not take long—a very short time. It was necessary for me to reverse (fol. 319). When I stopped and backed my engine, the *Woolverton* might have been a *hundred and fifty yards* (450 feet) away" (Record, fol. 425).

Again, at p. 29 of the brief, reference is made to the diagram attached to the brief of appellant's counsel for the former appeal, which is stated to have been drawn "in strict conformity with the findings of fact."

This statement is incorrect. The diagram was not so drawn at all.

Fourth.

The brief states (p. 29) that "the *Packer* asks for *an allowance of an appeal* or for a *certiorari*."

The petition only asks for a *certiorari* (Pet., fols. 20-21).

Fifth.

It is sufficient to say in answer to the long discussion in the brief, as to the jurisdiction of the Circuit Court of Appeals, that the application for a *certiorari* must concede it, for there is no provision of law for *certiorari* in any case except in cases "hereinbefore *made final* in the Circuit Court of Appeals."

The application for a *certiorari* is therefore a concession that the appeal to the Circuit Court of Appeals was regular and the decision of that Court final.

Sixth.

Furthermore, the appeal to the Circuit Court of Appeals was an admission that the Circuit Court had executed the mandate of this Court as it was directed to.

If the owner of the *Packer* had believed that the Circuit Court had not performed the mandate of this Court, he should have applied to this Court for a mandamus to compel the Circuit Court to execute it. Instead of doing so he appealed to the Circuit Court of Appeals and now claims that that Court had no jurisdiction to hear him!

Was it ever heard that a party could object to the jurisdiction which he had himself invoked?

Seventh,

I have time but to add one brief suggestion as to the merits of this petition.

The whole of it is based on the idea that this Court when the case was before it on the former appeal, substantially decided that the *Packer* was free from fault which contributed to this collision and that the Circuit Court therefore had no power to do anything except to dismiss the libel against the *Packer*.

But I respectfully suggest that this must be an erroneous view of the situation for the following reasons:

1. If such had been the decision of this Court, it would have given direction to the Circuit Court to dismiss the libel. But it did not do so.

2. The Supreme Court, in the opinion rendered by it, carefully refrained from the expression of any opinion that the *Packer* was free from fault. It said that her choosing to go ahead instead of astern of the *Woolverton* and her tow "*may have been* an exercise of discretion," etc., etc. It said: "Whether her starboarding was a fault *would depend*," etc. It said: "If such starboarding was likely to involve risk of collision then of course it was a fault," etc., etc., etc.

It sent the case back manifestly in order that the Circuit Court should, after making the finding referred to, proceed to pass upon the other questions upon whose answer the question of the liability of the *Packer* must depend.

It has always been my opinion that the Supreme Court gave the direction that it did in this case, in view of the fact that the passage of the Act of 1891 would give to the parties an appeal upon the whole case to the Circuit Court of Appeals, instead of the partial and unsatisfactory review on findings and bill of exceptions which the Supreme Court was confined to.

The claimants of the *Packer* have had the benefit of such complete review.

The result of it has been to bring the decisions of the Appellate Courts in Pennsylvania and New York into harmony and to free the Courts from the criticism that their action had cast the burden of a collision upon the party who was confessedly innocent of it and had discharged both of the two parties one of whom was confessedly the guilty cause of it.

It is hardly desirable, in order to justify that criticism again, that this Court should depart from its settled practice as to granting the writ of *certiorari* only in cases of *peculiar gravity and general importance.*

Eighth.

The petition for a *certiorari* should be denied.

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